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Capitalism and Unfreedom: Louis D. Brandeis and a Liberty of the Left

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CAPITALISM AND UNFREEDOM:
LOUIS D. BRANDEIS AND A LIBERTY OF THE LEFT
by
ERIC L. APAR

A master's thesis submitted to the Graduate Faculty in Political Science in partial fulfillment of
the requirements for the degree of Master of Arts, The City University of New York

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This manuscript has been read and accepted for the Graduate Faculty in Political Science in satisfaction of the thesis requirement for the degree of Master of Arts.

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ABSTRACT

Capitalism and Unfreedom: Louis D. Brandeis and a Liberty of the Left

by

Eric L. Apar

Advisor: Professor Ruth O'Brien

The American Right features a well-developed—and well-heeled—infrastructure for promoting a conception of freedom as inextricable from capitalism. The American Left, by contrast, has seemed content to cede the territory, abandoning the ground of freedom for the terrain of “equality,” “justice,” “fairness,” and “prosperity.” This paper is an effort to address this asymmetry in the public discourse over the meaning of freedom. Its principal objective is to capture the vision of freedom embodied in the political and economic thought of Louis D. Brandeis, one of the American Left’s ablest expositors of freedom.

In addition, the paper has three subsidiary objectives. The most important of these is to help put an end to the American Left’s defensive crouch in debates over the nature of freedom. To that end, I leverage Brandeis’s conceptions of freedom, the state, and the market into a more general argument about the nexus between those three phenomena. In particular, I cast the welfare and regulatory state as an organ of empowerment and emancipation rather than of restraint and inhibition, and I depict the untrammelled market not as a wellspring of freedom and creativity but as a source of constraint and enervation. The second subsidiary objective is to prod libertarians to interrogate the equation of the market with freedom and government with

constraint, in the hope of provoking a more robust and critical discourse over whether the libertarian program of meager government and unfettered markets truly advances the ideal of freedom. Finally, the paper aims not only to identify fault-lines between Left and Right but also to differentiate Brandeis's understanding of freedom from that of his Progressive brethren, in particular those Progressives who favored Theodore Roosevelt's "New Nationalism" over Woodrow Wilson's "New Freedom" in the presidential election of 1912.

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I. INTRODUCTION

“I am still puzzled,” wrote libertarian economist and political theorist Friedrich A. Hayek in 1956, “why those in the United States who truly believe in liberty should . . . have allowed the left to appropriate this almost indispensable term.”¹ Sixty years later, Hayek’s comment seems out of place. In the decades since Hayek puzzled over the failure of the American Right to take up the mantle of freedom, conservatives and libertarians have draped themselves in the garb of liberty. From grassroots organizations such as the Tea Party and FreedomWorks, to think tanks like the Heritage Foundation, the Cato Institute, and the American Enterprise Institute, to the “Freedom Caucus” in the United States House of Representatives, the American Right features a well-developed—and well-heeled—infrastructure for promoting a conception of freedom as inextricable from capitalism. The American Left, by contrast, has seemed content to cede the territory, abandoning the ground of freedom for the terrain of “equality,” “justice,” “fairness,” and “prosperity.”

This paper is an effort to address this asymmetry in the public discourse over the meaning of freedom. Its foremost objective is to capture the vision of freedom embodied in the political and economic thought of Louis D. Brandeis, one of the American Left’s ablest expositors of freedom. Scholars from across the disciplinary spectrum—from law, political science, history, and economics—have written extensively about Brandeis’s life and thought, and I rely heavily on those sources. This, however, is the first analysis devoted exclusively to Brandeis’s conception of freedom.

¹ *The Collected Works of F.A. Hayek: The Road to Serfdom, Text and Documents, The Definitive Edition, Volume II*, Ed. Bruce Caldwell (Routledge, London: University of Chicago Press, 2007), 45.

The ideal of freedom admits of many interpretations. This paper largely eschews this definitional thicket, for its object is not to arrive at the one True Freedom but rather to understand the meaning of freedom in the political and economic thought of Louis Brandeis. Brandeis never laid down a comprehensive political or economic system. Yet the Brandeisian creed is discoverable nevertheless; it must be cobbled together from a lifetime of action and argument. This is an attempt to illuminate one facet of that creed: its singular conception of freedom.

Although the chief ambition of this paper is to add a fresh perspective to the corpus of scholarly work on Brandeis's political and economic thought, the paper has three subsidiary objectives. The most important of these is to help put an end to the American Left's defensive crouch in debates over the nature of freedom. This is too expansive a project to be undertaken here, but I offer this paper as a contribution, however modest, to that larger endeavor. The goal here is to treat Brandeis's political and economic thought not only as a compelling subject in its own right, but also as a potential roadmap for countering the American Right's co-optation of the ideal of freedom. To that end, I leverage Brandeis's views of freedom, the state, and the market into a more general argument about the nexus between those three phenomena. In particular, I cast the welfare and regulatory state as an organ of empowerment and emancipation rather than of restraint and inhibition, and I depict the untrammelled market not as a wellspring of freedom and creativity but as a source of constraint and enervation.

The second subsidiary objective is to prod libertarians to interrogate the equation of the market with freedom and government with constraint. Hayek dedicated *The Road to Serfdom* to "[t]he socialists of all parties," in whose motives and principles he discerned much that was

noble.² I offer this paper in that same spirit—in the hope that, while there can be no compromising the centrality of freedom to libertarian thought, there might at least occur in libertarian circles a more robust and critical discourse over whether the libertarian program of meager government and unfettered markets truly advances the ideal of freedom. I draw from the libertarian and not from the conservative canon because it is the libertarian tradition that has chiefly animated the American Right’s embrace of freedom. Thus, when I refer to “the American Right,” I mean only the libertarian Right. While it is worth remaining cognizant of the extent to which American conservatives, from Barry Goldwater to Ronald Reagan to George W. Bush, have blended libertarianism with social, religious, and foreign policy conservatism, that is not my focus here.

Finally, this paper aims not only to identify fault-lines between Left and Right but also to differentiate Brandeis’s understanding of freedom from that of his Progressive brethren. To that end, it highlights two critical distinctions between Brandeis and many of his Progressive contemporaries, in particular those Progressives who favored Theodore Roosevelt’s “New Nationalism” over Woodrow Wilson’s “New Freedom” in the presidential election of 1912. The first of these distinctions concerns the relative position of freedom within a larger hierarchy of competing values. Indeed, where Brandeis elevated freedom as the highest ideal—to which all other goods, including material well-being, were ultimately subordinate—the “Rooseveltian Progressives” tended to assign freedom to a less exalted position relative to competing goods. In particular, they tended to sacrifice freedom to the demands of efficiency and social utility. The second distinction goes to the nature of freedom itself. Where Brandeis rooted his conception of

² “There can be no doubt,” wrote Hayek, “that . . . the belief that socialists would bring freedom is genuine and sincere. But this would only heighten the tragedy if it should prove that what was promised to us as the Road to Freedom was in fact the High Road to Servitude.” *Collected Works*, 78.

freedom in the ideals of self-ownership and local autonomy, the Rooseveltians tended to equate freedom with a rising standard of living, to be achieved by strengthening the central government and entrusting its stewardship to enlightened experts. This difference was crucial, for it led Brandeis to reject the Rooseveltians' embrace of centralized, expert-driven governance as incompatible with freedom. The aim here is not merely to highlight fissures within Progressivism that are worth investigating in their own right. It is also to encourage the American Left to rediscover the virtues of local control and to maintain a healthy distrust of elite-managed governance.

The paper is divided into two parts. The first tackles Brandeis's conception of individual freedom. It begins with a general examination of conceptions of individual freedom as a state of being—that is, as a condition of mind and spirit—and proceeds to examine Brandeis's notion of individual freedom in particular. Building on that analysis, it explores how Brandeis's conception of freedom as a condition of mind and spirit influenced his political and economic thought. To that end, it homes in on Brandeis's abhorrence of the twin evils of mass consumerism and economic centralization. It then moves to a discussion of Brandeis's approach to antitrust and the fault lines within the Progressive Movement that defined the presidential election of 1912, a contest in which Brandeis played a pivotal role as an advisor to Woodrow Wilson. Finally, it examines the exalted position of the independent small businessman in Brandeis's conception of freedom and highlights historical parallels with the political thought of Thomas Jefferson. In drawing out the kinship between Brandeis and Jefferson, the paper explores both Brandeis's vision for a Jewish homeland in Palestine and the commonalities between Brandeis's ideal of the independent small businessman and the yeoman farmer of Jeffersonian lore.

The second part concerns the nexus between freedom and democracy in Brandeis's political thought. It begins by distinguishing Brandeis's embrace of democracy as an organ of freedom with the libertarian understanding of democracy as a potential threat to freedom. In so doing, it likens Brandeis's vision of democracy as a fount of spiritual and psychological enrichment to Jefferson's notion of the "ward republic," designed to engage citizens in the everyday practice of self-government. It then proceeds to examine Brandeis's conception of the labor movement as a force for worker emancipation and concludes by analyzing the relationship between Brandeis's conception of freedom and his vision for workplace democracy.

II. FREEDOM OF THE INDIVIDUAL

a. Individual Freedom as a State of Being, Right and Left

Thinkers on both the American Left and the American Right have long converged on the notion that freedom is a state of being—with spiritual and psychological, as well as physical, dimensions. Franklin Roosevelt's "four freedoms," enunciated in the waning days of World War II and designed to set the agenda for the post-war global order, encompassed freedoms that allowed for action: specifically, freedom of expression and freedom of worship.³ But Roosevelt's typology also embraced freedoms that girded mind and spirit against the privations of life under capitalism: namely, freedom from fear and freedom from want.⁴ For Roosevelt, there was a spiritual and psychological underpinning to freedom.⁵ Freedom meant the thrusting

³ Cass R. Sunstein, *The Second Bill of Rights: FDR's Unfinished Revolution and Why We Need It More Than Ever* (New York: Basic Books, 2006), 2.

⁴ *Ibid.*, 61-95.

⁵ To be sure, Roosevelt also discerned a material underpinning to freedom. "[W]e have come to a clear realization," he proclaimed, "of the fact that true individual freedom cannot exist without economic security and independence." *Ibid.*, 12.

off of all shackles, whether overt and physical or subtle and psychological. “Necessitous men,” Roosevelt insisted, “are not free men.”⁶

Roosevelt’s solicitude for the human mind and spirit was characteristic of Progressive era and New Deal reformers. For Progressives and New Dealers, the unrestrained market vitiated mind and spirit by miring workers in endless toil. The American worker survived without living. Market fundamentalism, declared Progressive social scientist Horace Kallen, had become “anathema among lovers of liberty.”⁷ Government, with its capacity to ensure basic economic security and a well-regulated market, had an obligation to elevate the condition of the American worker.⁸

The notion of freedom as a state of being, as a kind of interior life, has long been a staple of libertarian thought as well. “[T]he most important change which extensive government control produces,” wrote Hayek, “is a psychological change, an alteration in the character of the people.”⁹ For libertarians, the danger to mind and spirit emanates not from unfettered capitalism, but rather from the welfare and regulatory state. In libertarian thought, to be free is to be daring and adventurous, creative and individualistic, independent and self-sustaining. These properties are born of the hardy experience of the “self-made” individual. The market acts as the crucible

⁶ *Ibid.*

⁷ Eric Foner, *The Story of American Freedom* (New York: W.W. Norton & Company, 1998), 152-53.

⁸ *Ibid.*

⁹ *Collected Works*, 48-49.

out of which this sturdiness of mind and spirit emerges.¹⁰ The state, by contrast, enervates mind and spirit, “gradually smother[ing] the creative powers of a free civilization”¹¹

In examining the relationship of the state to freedom in libertarian thought, it is useful to distinguish the welfare from the regulatory state. While both the welfare and the regulatory state “paralyze the driving forces of a free society[,]” each assumes a distinctive role in the libertarian aversion to state power.¹² For libertarians, the welfare state saps the life from mind and spirit by subverting the ethic of individual responsibility, that great wellspring of human maturation. The welfare state breeds dependency and helplessness; it “actively discourages self-help by crippling the incentive for rehabilitation.”¹³ Reduced to a form of serfdom, mind and spirit languish, never ascending to the sublime virtues—courage, creativity, self-sufficiency—that are the substance of genuine freedom.¹⁴

The regulatory state, for its part, weakens mind and spirit by upwardly transferring responsibility from individuals themselves to remote bureaucrats, leaving an inert population in its wake.¹⁵ “The so-called economic freedom which the planners promise us,” Hayek

¹⁰ With the advent of free markets, writes libertarian political theorist Murray Rothbard, “[e]ntrepreneurs were to be free at last to compete, to develop, to create. The shackles of control were to be lifted from land, labor, and capital alike.” Murray N. Rothbard, *For a New Liberty: The Libertarian Manifesto* (Auburn: Skyler J. Collins, Large Print ed., 2012), 3.

¹¹ *Collected Works*, 45.

¹² See *Ibid.*

¹³ Rothbard, *For a New Liberty*, 206.

¹⁴ In libertarian thought, these virtues are often tied to the human struggle to transform nature into a means of survival and prosperity. Human beings, wrote Rothbard, “can only survive and flourish by grappling with the earth around them. . . . [T]hey must also, in order to survive and maintain themselves, transform the resources given by nature . . . into objects more suitable for their use and consumption.” *Ibid.*, 37.

¹⁵ Hayek frames this transfer of responsibility thusly: “The question is whether . . . it is better that the holder of coercive power should confine himself in general to creating conditions under which the knowledge and initiative of individuals are given the best scope so that *they* can plan most successfully; or whether a rational utilization of our resources requires *central* direction and

maintained, “means precisely that we are to be relieved of the necessity of solving our own economic problems and that the bitter choices which this often involves are to be made for us.”¹⁶ Just as initiative and ingenuity wilt under the largesse of the welfare state, so too does the regulatory state promote the listlessness and complacency that accompany rule from above.¹⁷

For libertarians, the market stands as the antidote to the enervating influence of the welfare and regulatory state. Where the welfare state dispenses goods and services as a matter of right, market participants fight tooth and claw to prosper, cultivating that sturdiness of mind and spirit that is the core of inner freedom.¹⁸ Where the regulatory state vests decision-making power in remote bureaucrats, the market entrusts that power to individual producers and consumers. Where the market reigns, the motive force of humanity flourishes. Under the weight of a benevolent Leviathan, that motive force atrophies.¹⁹ “The great advances of civilization . . .

organization of all our activities according to some consciously constructed ‘blueprint.’” *Collected Works*, 85.

¹⁶ *Ibid.*, 127.

¹⁷ In *The Road to Serfdom*, Hayek cites a British sociological survey to capture this degradation of mind and spirit. Its portrait of the British regulatory state is typical of libertarian thought:

Special agencies, called Citizen’s Advice Bureaus, are set up to steer the bewildered through the forest of rules, and to indicate to the persistent the rare clearings where a private person may still make a choice. . . . [The town lad] is conditioned not to lift a finger without referring mentally to the book of words first. A time-budget of an ordinary city youth for an ordinary working day would show that he spends great stretches of his waking hours going through motions that have been predetermined for him by directives in whose framing he has had no part, whose precise intention he seldom understands. . . . Surveying his parents and his older brothers or sisters he finds them as regulation bound as himself. He sees them so acclimated to that state that they seldom plan and carry out under their own steam any new social excursion or enterprise. He thus looks forward to no future period at which a sinewy faculty of responsibility is likely to be of service to himself or others.

See *Ibid.*, 48-49.

¹⁸ “[E]ach individual,” writes Rothbard, “must think, learn, value, and choose his or her ends and means in order to survive and flourish . . .” Rothbard, *For a New Liberty*, 34.

¹⁹ It is precisely this motive force—and not the largesse of the welfare state—that libertarians insist will propel the poor out of poverty. “[O]ne of the most significant ways in which the

have never come from centralized government,” wrote libertarian economist Milton Friedman. “Government . . . replace[s] mediocrity for the variety essential for that experimentation which can bring tomorrow’s laggards above today’s mean.”²⁰ For Brandeis, however, government properly deployed did not suppress mind and spirit. Rather, government played a role in preserving human vitality against the enervating tendencies of capitalism.

b. Individual Freedom in Brandeisian Thought

Brandeis was aghast at the human suffering that industrialization had wrought, and he believed that government had an obligation to improve the lives of the poor and the middle class. That is, he embraced government as a vehicle for promoting social utility.²¹ Without minimum wage and maximum hours legislation, public works programs, unemployment insurance, and vigorous supervision of the market to ensure free competition and fair prices, poverty and stagnation would continue to afflict the American working class.²²

The impulses that motivated Brandeis were not principally utilitarian, however. For Brandeis, the promotion of material well-being was a vital function of a society, but it was not its *raison d’etre*. The ultimate end of a society was not material progress but rather the cultivation of a particular sort of human being, possessed of an elevated cast of mind and spirit. “[A]lways and everywhere,” Brandeis averred, “the intellectual, moral, and spiritual development of those

government could aid the poor,” wrote Rothbard, “is by removing its own direct roadblocks from their productive energies.” *Ibid.*, 194.

²⁰ Milton Friedman, *Capitalism and Freedom* (Chicago: The University of Chicago Press, 2002), 3-4.

²¹ In part, Brandeis saw government’s obligation to promote the general welfare as a corrective for its own failings: “If the government permits conditions to exist which make large classes of citizens financially dependent, the great evil of dependence should at least be minimized by the State’s assuming, or causing to be assumed by others, in some form the burdens incidents to its own shortcomings.” Philippa Strum, *Brandeis: Beyond Progressivism* (Lawrence, Kansas: University Press of Kansas, 1993), 159.

²² *Ibid.*, 144-45.

concerned will remain an essential—and the main factor—in real betterment.”²³ For Brandeis, the goal was not to maintain a sated population, for “[i]mprovement in material conditions of the worker and ease are the incidents of better conditions—valuable mainly as they may ever increase the opportunities for development.”²⁴ Rather, the aim was to nurture an engaged and vibrant citizenry, one capable of ingenuity and creativity. “For our objective,” wrote Brandeis, “is the making of men and women who shall be free, self-respecting members of a democracy—and who shall be worthy of respect.”²⁵

In testimony before the United States Commission on Industrial Relations in 1915, Brandeis articulated this distinction thusly:

Commissioner Lennon: Mr. Brandeis, in speaking with regard to the physical betterment that has come about . . . in these great industries, did you mean . . . that these physical betterments were not something of an element toward progress, toward democratic manhood?

Mr. Brandeis: They are all gains for manhood; and we recognize that manhood is what we are striving for in America. We are striving for democracy; we are striving for the development of men. It is absolutely essential in order that men may develop that they be properly fed and properly housed, and that they have proper opportunities of education and recreation. We can not reach our goal without those things. *But we may have all those things and have a nation of slaves.*²⁶

The term “manhood” should be construed here neither as an exaltation of masculine virtues nor as an affront to women. Brandeis embraced the cause of women’s suffrage, albeit after an initial period of opposition, and he deeply admired the women with whom he worked as a progressive

²³ *Brandeis on Democracy*, ed. Philippa Strum (Lawrence, Kansas: University Press of Kansas, 1995), 34.

²⁴ *Ibid.*

²⁵ *Ibid.*

²⁶ *Ibid.*, 101 (emphasis added).

reformer.²⁷ Instead, “manhood” signifies a particular condition of mind and spirit: the mind of the creative individual, the spirit of sturdy self-reliance. These—and *not the blessings of material prosperity*—were the markers of the free individual, for “we may have” material well-being and still “have a nation of slaves.”²⁸

Just as spiritual and psychological vitality takes on a pivotal role in Brandeis’s conception of freedom, so too does it occupy a privileged place in libertarian thought. But where libertarians conceive of capitalism as a fount of spiritual and psychological invigoration, the untrammelled market operates in Brandeis’s vision of freedom as a source of mental and spiritual enervation. In libertarian thought, the welfare and regulatory state reduces the individual to the condition of a passive observer in a world shaped by alien forces.²⁹ Under the market, by contrast, individuals act not as inert spectators to power but rather as the protagonists of their own lives, imbued with personal agency. This exercise of agency enlivens the human mind and spirit, bracing them for the rigors of a free life.³⁰

Brandeis insisted that, in fact, the untrammelled market deprived individuals of agency. The underlying structure of his argument mirrored that of libertarianism: human beings, Brandeis

²⁷ Jeffrey Rosen, *Louis D. Brandeis: American Prophet*, (New Haven: Yale University Press, 2016), 19-20.

²⁸ *Brandeis On Democracy*, 101.

²⁹ For Hayek, this state of passivity had helped pave the way for the Third Reich: “It was that a larger part of the civil life of Germany than of any other country was deliberately organized from the top, so that a large proportion of her people did not regard themselves as independent but as appointed functionaries, which gave her social structure its peculiar character.” *Collected Writings*, 153, 155.

³⁰ This, Rothbard claimed, is the natural course of human existence. For the state to interfere in this salutary process is to violate man’s very nature. As Rothbard writes, “the nature of man is such that each individual person must . . . choose his own ends and employ his own means . . . to attain them. . . . [E]ach man must learn about himself and the world, use his mind to select values, learn about cause and effect, and act purposively to maintain himself and advance his life. . . . [I]t becomes vitally necessary for each man’s survival and prosperity that he be free to learn, choose, develop his faculties, and act upon his knowledge and values.” Rothbard, *For a New Liberty*, 33.

maintained, could be spiritually and psychologically vital only when they assumed responsibility for themselves and for the world around them.³¹ For Brandeis, as for libertarians, vitality of mind and spirit entailed both self-sufficiency and self-governance. But where the champions of unfettered capitalism argued that the welfare and regulatory state suffocated the self-made, self-governing individual, Brandeis saw that such an individual emerged only with the aid of a smartly designed welfare and regulatory state.³²

What, then, did Brandeis's conviction that the untethered market eroded spiritual and psychological freedom mean in practice? How did he propose to deploy the state as a cudgel against mental and spiritual poverty? Two interwoven strains in Brandeisian thought come to the fore: first, his opposition to the twin phenomena of economic concentration and mass consumerism; second, his embrace of the small businessman.

c. Concentration, Consumerism, and Human Decline

Brandeis harbored deep misgivings about the economy of mass consumption that was beginning to take hold at the turn of the 20th century. These apprehensions derived from his faith in individual responsibility as the wellspring for human vitality. "The great developer," Brandeis maintained, "is responsibility."³³ Again, Brandeis's conception of individual responsibility as the source of human maturation reveals a kinship with libertarianism. But where libertarians insist that the market fosters individual responsibility, Brandeis discerns in unregulated capitalism the very infirmity that libertarians ascribe to the welfare and regulatory state: namely, an upward transfer of power and responsibility from individuals and communities to remote superintendents. Those superintendents changed form. In the corridors of state power,

³¹ See Strum, *Brandeis: Beyond Progressivism*, 36, 46-47.

³² See *Ibid.*, 146.

³³ *Brandeis On Democracy*, 34.

they were legislators, bureaucrats, and lobbyists; in the market, they were managers, financiers, and corporate boards.³⁴ For Brandeis, however, the basic malady inhered in big business no less than in big government.

For Brandeis, responsibility of the kind that nourished mind and spirit meant control over productive enterprise. By the dawn of the 20th century, such control had come to reside in a small class of quasi-oligarchs. Brandeis feared that the individual's ever-lessening control over the nature and direction of productive enterprise would debase the human psyche. If control of productive enterprise remained with an elite few, the mass of citizens would become tools rather than agents of production, their sights fixed on stultifying tasks imposed by alien forces.³⁵ The object of those tasks, their duration and frequency, the manner of performing them—these would be determined not by individuals themselves, but by floor supervisors, middle managers, and corporate boards. Under the untrammelled market, Brandeis argued, the dynamic process of creation would become the province of a privileged few. For the many, the unregulated market offered only tedium and servility.³⁶

³⁴ Brandeis regularly compared the growth of corporate power with the development of repressive political power. "The development of our financial oligarchy followed . . . lines with which the history of political despotism has familiarized us: usurpation, proceeding by gradual encroachment rather than by violent acts; subtle and often long-concealed concentration of distinct functions, which are beneficent when separately administered, and dangerous only when combined in the same persons." Louis D. Brandeis, *Other People's Money and How the Bankers Use It* (iBooks Edition: Mustbe Interactive, 1914), 6.

³⁵ The severing of the personal ties between employer and employee that existed prior to the age of mass production figured prominently in Brandeis's critique of modern industrial society. As Strum writes, Brandeis was greatly troubled by the fact that "[t]he giant trusts had amassed so much economic power that most Americans would spend their lives working for faceless employers in huge enterprises to which they felt no personal connection." Strum, *Brandeis: Beyond Progressivism*, 82.

³⁶ Strum captures Brandeis's diagnosis thusly: "Brandeis was angered not only because [workers] were being exploited . . . but also because they were being turned into automatons unable to learn about and participate in the political process, with the result that the country was becoming far less democratic." *Ibid.*

The corollary was that, as a dwindling few came to dominate the creative process of production, a growing many were relegated to the passive activity of consumption. The organization of economic life became the project of a shrinking minority; for most, the economy descended from above as a thing to be consumed rather than constructed. “A society in which a few men are the employers and the great body are merely employees or servants,” Brandeis argued, “is not the most desirable in a republic”³⁷ The widening distance between the individual citizen and the corridors of economic power, wherein the powerful fashioned the macroeconomy for consumption by the mass public, informed Brandeis’s pleas for economic decentralization. For only through the maintenance of modest enterprise—in the stewardship of which average people could participate—could a society of producers, rather than consumers, be preserved. “[I]t should be as much the policy of the laws to multiply the numbers engaged in independent pursuits or in the profits of production,” Brandeis averred, “as to cheapen the price to the consumer.”³⁸

Brandeis insisted that economic centralization generated inefficiency. The “curse of bigness,” in Brandeis’s telling, brought with it unwieldy bureaucracies and gratuitous middlemen.³⁹ For Brandeis, this was true of governments and corporations alike. But Brandeis’s embrace of the small unit in both politics and economics clashed with the dominant intelligentsia’s attachment to large-scale enterprise. According to then-prevailing wisdom, the

³⁷ Stephen W. Baskerville, *Of Laws and Limitations: An Intellectual Portrait of Louis Dembitz Brandeis* (Cranbury, NJ: Associated University Presses, Inc., 1994), 116.

³⁸ *Ibid.*

³⁹ Brandeis identified the investment banker as a particularly noxious financial intermediary. “Though properly but middlemen, these bankers bestride as masters America’s business world, so that practically no large enterprise can be undertaken successfully without their participation or approval.” Brandeis, *Other People’s Money*, 5.

great trusts—when properly regulated—offered an array of efficiencies, from economies of scale and shared expertise to the surplus capital that underwrote research and development.⁴⁰

For Brandeis, however, efficiency was secondary. More important was the fact that economic concentration vested control over the character and direction of productive enterprise in a cadre of corporate titans.⁴¹ The wider public were left to consume the fruits of large-scale capitalism while toiling in enterprises they neither influenced nor fully understood. As a consequence, their creative capacities atrophied; their inner vitality withered. Their minds and spirits took the shape of their daily lives: passive, myopic, and disengaged.⁴² If individual responsibility was the wellspring of spiritual and psychological development, the defining feature of an unregulated market was that workers and consumers were responsible for little that was invigorating or ennobling.

There is a kinship here between Brandeis’s aversion to consumerism and the dystopic vision of an anemic humanity that appears in libertarian assaults on the welfare and regulatory state. The libertarian specter of a torpid population springs from the notion that the welfare and regulatory state makes people spectators to, rather than participants in, the construction of economic, social, and political life.⁴³ As passive observers to their own lives, individuals grow

⁴⁰ Strum, *Brandeis: Beyond Progressivism*, 75-76.

⁴¹ “[E]ven more important than efficiency are industrial and political liberty[.]” Brandeis maintained, “and these are imperiled by the Money Trust.” Brandeis, *Other People’s Money*, 41.

⁴² In their quiescence, moreover, consumers had ensured the survival of the “curse of bigness.” As Thomas K. McCraw observes: “Consumers had in effect betrayed [Brandeis]; they had refused to follow his precepts against bigness; they had revealed their true nature by passively buying the endless stream of goods that flowed from the center economy. In that way, consumers had guaranteed the success and permanence of the center firms Brandeis so detested. And for such a mistake, he would never forgive them.” Thomas K. McCraw, *Prophets of Regulation: Charles Francis Adams, Louis D. Brandeis, James M. Landis, Alfred E. Kahn* (Cambridge, Massachusetts: The Belknap Press of Harvard University Press, 1984), 107-08.

⁴³ See Hayek, *The Road to Serfdom*, 48-49.

soft and supine; their grand ambitions give way to the meaner concerns of the appetite.⁴⁴ Brandeis feared this same specter of dependence and febrility. He conceived of the consumer as “servile, self-indulgent, indolent, ignorant.”⁴⁵ “[T]he great social-economic troubles,” Brandeis contended, “arise from the fact [that] the consumer has failed absolutely to perform his function He lies not only supine, but paralyzed [and] deserves to suffer like others who take their lickings ‘lying down.’”⁴⁶

Yet Brandeis saw the untrammled market not as a cure but rather as a different species of the same disease. Indeed, Brandeis’s contempt for the consumer mirrored that of libertarians for the lifeless subject of the welfare and regulatory state. Both of these characters are weak-willed and feeble-minded, passive and complacent. Their faculties atrophy as distant superintendents deprive them of agency. For libertarians, those superintendents are the bureaucrats who preside over the political domain. For Brandeis, by contrast, they are the quasi-oligarchs who lorded over the realm of commerce. “The relations between rival railroad systems,” Brandeis maintained, “are like the relations between neighboring kingdoms. The relations of the great trusts to the consumers or to their employees is like that of feudal lords to commoners or dependents.”⁴⁷

It must be stressed that Brandeis never conceived of government as a panacea for the scourge of economic concentration. To the contrary, Brandeis understood that government was as vulnerable to the perils of centralization as was business. Without limits on its size and scope, government would engender the same upward shift in power and responsibility that characterized

⁴⁴ See Friedman, *Capitalism and Freedom*, 3-4.

⁴⁵ McCraw, *Prophets of Regulation*, 107.

⁴⁶ *Ibid.*

⁴⁷ *Brandeis On Democracy*, 56.

a consumer-driven economy.⁴⁸ Still, Brandeis believed in the power of government to arrest and even to reverse the tide of consumerism and centralization. He believed, that is, in the capacity of government to resist the spiritual and psychological degradation wrought by the unbridled market. For Brandeis, one of government's most formidable tools for achieving this objective lay in its power to enact and enforce antitrust law.

d. Government as a Cudgel: Antitrust and the Fight Against Centralization

If economic centralization empowered an elite few while relegating the mass of citizens to the passive activity of consumption, Brandeis sought a corrective in the welfare and regulatory state. Far from subverting the spirit of the producer, government could sustain that spirit against the pressures of a consumer economy. The power of the purse, for instance, stood among government's most powerful devices for preserving small-scale enterprise. To impose limits on corporate size, Brandeis argued for heavy taxation of large corporations.⁴⁹ He embraced a progressive income tax to ensure that the nation's wealth—and, by extension, its productive capacity—did not become the exclusive property of an economic elite.⁵⁰ He favored high rates of taxation for estates and bequests to prevent the intergenerational perpetuation of wealth.⁵¹ “By taxation bigness can be destroyed,” Brandeis declared. “The power is there: what we create we can destroy.”⁵² For Brandeis, taxation designed to thwart the scourge of bigness did not threaten freedom. To the contrary, such taxation safeguarded freedom against the dangers of centralized production.

⁴⁸ Strum, *Brandeis: Beyond Progressivism*, 91-92.

⁴⁹ Brandeis proposed to contain the growth of corporations by imposing “an annual excise tax rapidly progressing in the rate as the total capitalization of the Corporation rises.” See Rosen, *Louis D. Brandeis: American Prophet*, 79.

⁵⁰ *Ibid.*

⁵¹ *Ibid.*

⁵² Strum, *Brandeis: Beyond Progressivism*, 96.

Brandeis's willingness to wield the power of the purse as a cudgel against the curse of bigness reveals much about his conception of government and its role in preserving the conditions for freedom. Yet Brandeis left a more enduring legacy in the field of antitrust, and it is here that his aversion to consumerism and economic centralization comes into sharpest relief. As the architect of Woodrow Wilson's "New Freedom" domestic agenda, Brandeis left an indelible imprint on antitrust policy in the United States.⁵³

The first major attempt at antitrust policy in the United States came in 1890, with the passage of the Sherman Antitrust Act.⁵⁴ Brandeis knew well that the Sherman Act had proved toothless in the face of growing economic concentration.⁵⁵ The Sherman Act prohibited only "concerted activities" in restraint of trade—that is, it covered collusion between companies, but it did not reach the actions of a single enterprise, save for those that gave rise to outright monopoly.⁵⁶ This gap in the Act's scope touched off a wave of corporate mergers and acquisitions, as companies sought to do as a single entity what they were barred from doing as separate businesses acting in concert.⁵⁷ The Act's proscription of monopolies and attempts at monopoly provided some check on this process. Short of monopoly, however, businesses could engage in anticompetitive behavior with impunity, provided they operated under the protective awning of a single entity.⁵⁸

⁵³ Thomas K. McCraw characterizes Brandeis as "[t]he most influential critic of trusts during his generation[.]" "Brandeis," McCraw argues, "exemplified the anti-bigness ethic without which there would have been no Sherman Act, no antitrust movement, and no Federal Trade Commission." McCraw, *Prophets of Regulation*, 82.

⁵⁴ See McCraw, *Prophets of Regulation*, 78-80.

⁵⁵ See *Ibid.*, 101-03, 114.

⁵⁶ See Alan J. Meese, "Intrabrand Restraints and the Theory of the Firm," *North Carolina Law Review*, Vol. 83, No. 1 (Dec. 2004): 5-86, at 6-7.

⁵⁷ See George Bittlingmayer, "Did Antitrust Policy Cause the Great Merger Wave?" *The Journal of Law & Economics*, Vol. 28, No. 1 (Apr. 1985): 77-118, at 87.

⁵⁸ See Meese, "Intrabrand Restraints and the Theory of the Firm," 6-7.

The Act was diluted, moreover, by conservative courts that pounced on the Act's loopholes and ambiguities. In particular, the United States Supreme Court held that the Sherman Act proscribed only "unreasonable" activity in restraint of trade, a penumbra the trusts exploited to great profit.⁵⁹ By the time of Woodrow Wilson's election in 1912, the need for reform was clear. In crafting Wilson's "New Freedom" domestic platform—and in developing the principle of "regulated competition"—Brandeis helped lay the intellectual foundation for the Clayton Antitrust Act and the Federal Trade Commission Act.⁶⁰

The Clayton Act enlarged the Sherman Act's narrow focus on collusion and forbade anticompetitive practices more generally—even those of a single entity acting in isolation.⁶¹ It went beyond the Sherman Act's prohibition of monopoly, barring mergers and acquisitions that "substantially lessen[ed] competition[,]" even where the anti-competitive effects fell short of outright monopoly.⁶² For its part, the Federal Trade Commission Act established the Federal Trade Commission, the enforcement arm of Wilson's newly invigorated antitrust regime.⁶³ The Act empowered the Commission to investigate anticompetitive practices and to enforce the Sherman and Clayton Acts.⁶⁴ The Commission wielded unprecedented investigative and enforcement authority, and it was Brandeis's imprimatur that ultimately persuaded Wilson to forge ahead with the agency without cabining its broad powers.⁶⁵

Brandeis's antitrust policy had definite utilitarian aims. It aimed to prevent price fixing, anticompetitive mergers and acquisitions, and other forms of collusion and concentration that

⁵⁹ See McCraw, *Prophets of Regulation*, 115-16.

⁶⁰ See Strum, *Brandeis: Beyond Progressivism*, 83-87.

⁶¹ See 15 U.S.C. Sec. 13; 15 U.S.C. Sec. 14.

⁶² See 15 U.S.C. Sec. 18.

⁶³ See McCraw, *Prophets of Regulation*, 124.

⁶⁴ See Rosen, *Louis D. Brandeis: American Prophet*, 65, 106

⁶⁵ See McCraw, *Prophets of Regulation*, 124.

enriched big business at the expense of the consuming public.⁶⁶ But the core objective of Brandeis's antitrust policy was a more elevated one. For Brandeis, the overriding aim of antitrust policy was to combat centralization and preserve the conditions under which individuals could act as their own masters. Only under such conditions could the psychological and spiritual health of humanity be maintained. "[F]ar more serious than even than the suppression of competition is the suppression of industrial liberty, indeed of manhood itself, which this overweening financial power entails[.]" Brandeis wrote. "Its blighting and benumbing effect extends as well to the small and seemingly independent business man, to the vast army of professional men and others directly dependent upon 'Big Business,' and to many another."⁶⁷ In practical terms, countering this "blighting and benumbing effect" meant an antitrust policy aimed at replacing the pliant consumer with the self-sustaining small businessman.

It is worth emphasizing that Brandeis fashioned his antitrust policies to advance the interests of consumers and small businessmen alike. The argument here is simply that, when those interests clashed, Brandeis elevated the intrepid small businessman over the inert consumer.⁶⁸ Understanding this hierarchy within Brandeis's political and economic thought is

⁶⁶ During the presidential campaign of 1912, Brandeis distilled his antitrust vision in a letter to Wilson that would serve as a template for the reforms of the Wilson Administration. In the letter, Brandeis urged Wilson to call for the strengthening of the Sherman Act, the imposition of harsher judicial sanctions for antitrust violations in the form of restitution to victims and forced dissolution of offenders, and the creation of an entity charged with administering a revived Sherman Act. See *Ibid.*, 111.

⁶⁷ Brandeis, *Other People's Money*, 32.

⁶⁸ McCraw provides a useful explanation of the practical implications of Brandeis's preference for the small businessman over the consumer: "[Brandeis's] intense predisposition in favor of small units led him to endorse loose, horizontal, productively inefficient, consumer-injuring associations for the suppression of competition. Conversely, Brandeis opposed horizontally tight, productively efficient, consumer-helping, vertically integrated center firms on the grounds that their size and central management destroyed individualism. Here his economic argument merged into a more complex political judgment. Whereas center firms helped the economy but

crucial to comprehending his notion of freedom. For it helps to underscore Brandeis's conception of freedom as a matter of self-creation and self-ownership—ideals that were not always compatible with the demands of aggregate utility and material prosperity. It also helps, as such, to highlight cleavages within Progressivism that came to the fore in the presidential election of 1912.

e. The New Freedom: The Election of 1912 and the Struggle Within Progressivism

The presidential election of 1912 shone a light on fissures within the Progressive Movement. As a pivotal advisor to Democratic candidate Woodrow Wilson, Brandeis helped define the fault lines separating Wilson from Theodore Roosevelt, standard-bearer for the Progressive or “Bull Moose” Party. For Brandeis, the contest hinged on the division between “regulated competition” and “regulated monopoly.” The Brandeisian-Wilsonian policy of “regulated competition” aimed to dismantle the great trusts and to prevent them from ever emerging again. It sought, in characteristic Brandeisian fashion, to preserve a small-unit economy.⁶⁹ Roosevelt, by contrast, preferred not to upend the great trusts but rather to harness their potential through vigorous regulatory oversight. Brandeis derided the Rooseveltian approach as “regulated monopoly.” “The issue is not . . . Shall we have unrestricted competition or regulated monopoly?” Brandeis argued. “It is, Shall we have regulated competition or regulated monopoly?”⁷⁰

threatened the decentralist American polity, loose combinations of peripheral firms injured the economy but tended to protect the polity.” McCraw, *Prophets of Regulation*, 108.

⁶⁹ For a helpful description of the dichotomy between “regulated competition” and “regulated monopoly, see Foner, *The Story of American Freedom*, 158-61.

⁷⁰ McCraw, *Prophets of Regulation*, 110.

The campaign pitted Wilson's "New Freedom," of which Brandeis was the chief architect, against Roosevelt's "New Nationalism."⁷¹ This dichotomy was more than mere campaign fodder. For it encapsulated a philosophical divide that helps illuminate the singularity of Brandeis's vision of freedom. For Brandeis, Roosevelt's attempts to secure the advantages of corporate bigness while containing its excesses were doomed to failure.⁷² More significantly, the Rooseveltian model of heavy regulation to check big business was incompatible with freedom. "This difference in the economic policy of the two parties is fundamental and irreconcilable," Brandeis wrote to Wilson. "It is the difference between industrial liberty and industrial absolutism."⁷³

On Brandeis's account, the supposed efficiencies of corporate bigness were illusory, rooted in an inflated conception of human capabilities. Excessive size meant a loss of human control. This was true, according to Brandeis, of mammoth corporations and sprawling government bureaucracies alike.⁷⁴ The Rooseveltian approach to antitrust rested on the notion that a powerful regulatory apparatus could counterbalance the great trusts, checking their power without relinquishing their vaunted efficiencies. For Brandeis, however, concentrated economic power could no more be tamed than could concentrated political power. Such power could only be destroyed. "There is no way to safeguard people against despotism except to prevent despotism[.]" Brandeis insisted. "There is no way to safeguard the people from the evils of a private . . . monopoly except to prevent the monopoly."⁷⁵ Nor was there any guarantee that regulatory bureaucracies would remain under the stewardship of public-spirited reformers. They

⁷¹ See Strum, *Brandeis: Beyond Progressivism*, 83.

⁷² See *Brandeis On Democracy*, 118-19.

⁷³ *Ibid.*, 111.

⁷⁴ See *Brandeis On Democracy*, 9.

⁷⁵ Strum, *Brandeis: Beyond Progressivism*, 19.

were just as likely to fall prey to industry actors and their political allies. “[D]o not pin too much faith in legislation,” Brandeis admonished. “Remedial institutions are apt to fall under the control of the enemy and to become instruments of oppression.”⁷⁶ Plainly, Brandeis understood the danger of what political scientists would later characterize as “agency capture.”

Popular control of institutions was important to Brandeis’s conception of freedom, for it spoke to the capacity of individuals and communities to marshal both public and private institutions to their own ends. But an undue emphasis on divisions over institutional size and effectiveness obscures deeper cleavages between the Wilsonians and the Rooseveltians—cleavages that go to the relative positions of freedom and prosperity within a larger hierarchy of contending values. For Brandeis, freedom was the transcendent value—the good to which all other goods, including prosperity, were subordinate. Brandeis made this hierarchy manifest during a debate with Samuel Gompers, founder of the American Federation of Labor:

Mr. Gompers quoted some time ago the saying of Heine that ‘Bread is Freedom.’ The ancient Greeks, recognizing that ‘Man cannot live by bread alone,’ declared that ‘Leisure is freedom.’ Undoubtedly ‘A full dinner pail’ is a great achievement as compared with an empty one, but no people ever did or ever can attain a worthy civilization by the satisfaction merely of material needs, however high these needs are raised Our education and condition of life must be such as become a ruler. Our great beneficent experiment in democracy will fail unless the people, our rulers, are developed in character and intelligence.⁷⁷

This is not to contend that the Rooseveltians were indifferent to freedom, either in its physical or in its spiritual and psychological manifestations. It is merely to assert that freedom did not occupy the same exalted place in Rooseveltian Progressivism that it did in Brandeisian thought.⁷⁸ “Our is a program of liberty[,]” argued Wilson. “[T]heirs is a program of

⁷⁶ *Brandeis on Democracy*, 34.

⁷⁷ *Ibid.*, 91.

⁷⁸ “[T]he most significant difference between the programs of Roosevelt and Brandeis-Wilson,” McCraw writes, “lay in the latter’s insistence that the government forcibly break apart the center

regulation.”⁷⁹ While Brandeis clung to the Jeffersonian ideal of an independent, self-sustaining citizenry, the Rooseveltians heralded the burgeoning consumer economy of the early 20th century, with its unprecedented capacity to produce and distribute goods on a mass scale.⁸⁰ The Rooseveltians believed, moreover, that the efficiencies of large-scale commercial enterprise had paved the way for this new abundance.⁸¹

For the Rooseveltians, the task of government was not to dismantle this wellspring of prosperity in the hope of reviving a moribund ideal of personal independence. Rather, the function of government was to ensure that the great trusts, rather than enrich an economic elite, fostered the common good. The Brandeisian call to dissolve the great trusts seemed to Rooseveltian Progressives a needless reversion to a less prosperous past—a quaint anachronism at best. At worst, Brandeis’s embrace of the small unit in both politics and economics impeded the march toward a great and modern society.⁸²

For the Rooseveltians, the Brandeisian-Wilsonian program meant jettisoning the grand economies of scale that spurred economic growth, undercutting the purchasing power of large distributors whose leverage over manufacturers drove down the price of consumer goods, and

firms formed over the last thirty years, *whatever the resulting disruption to the national economy.*” McCraw, *Prophets of Regulation*, 111 (emphasis added).

⁷⁹ Rosen, *Louis D. Brandeis: American Prophet*, 63.

⁸⁰ See Foner, *The Story of American Freedom*, 147.

⁸¹ See Philippa Strum, *Louis D. Brandeis: Justice for the People*, (New York: Schocken Books, 1984), 147.

⁸² Foner captures the mentality of the Rooseveltians thusly: “To Roosevelt’s supporters, . . . Wilson seemed a relic of a bygone era, whose program served the needs of small businessmen but ignored the interests of professionals, consumers, and labor. . . . Wilson and Brandeis spoke of the “curse of bigness”: what the nation actually needed . . . was frank acceptance of the inevitability and benefits of bigness, coupled with the active intervention of government to counteract its abuses while guiding society toward common goals. . . . Wilson’s statement that limits on governmental power formed the essence of freedom, Roosevelt pointedly remarked, ‘has not one particle of foundation in the facts of the present day.’” Foner, *The Story of American Freedom*, 160.

taxing large but productive businesses out of existence.⁸³ This seemed a high price to pay to exhume the spirit of Jefferson. For Brandeis, however, it was a price worth paying. The task, as such, was to reinvigorate the Jeffersonian ideal of the independent small producer. Brandeis found his vessel for this task in the small businessman.

f. The Freedom of the Small Businessman

Brandeis insisted that the maintenance of a small-unit economy accorded with the utilitarian aim of promoting material well-being.⁸⁴ Brandeis recognized, however, that freedom and prosperity were distinct goods—interwoven, to be sure, but nonetheless distinct. Prosperity depended on the free exercise of the creative faculties, just as freedom depended on a basic measure of prosperity. But Brandeis saw the potential for a collision between freedom and prosperity. In 1916, in a lecture titled “The Living Law,” he outlined the basic tension:

[W]hile invention and discovery created the possibility of releasing men and women from the thralldom of drudgery, there actually came with the introduction of the factory system and the development of the business corporation, new dangers to liberty. Large publicly owned corporations replaced small privately owned concerns. Ownership of the instruments of production passed from the workman to the employer. Individual personal relations between the proprietor and his help ceased. The individual contract of service lost its character, because of the inequality in position between employer and employee. The group relation of employee to employer, with collective bargaining, became common; for it was essential to the workers' protection.⁸⁵

Ultimately, if freedom required spiritual and psychological vitality, it meant safeguarding a sphere of autonomy within which individuals could act as their own masters. That, in turn, meant preserving small-scale enterprise. If, however, prosperity meant cheap and abundant

⁸³ See *Ibid.*, 158-60; Strum, *Brandeis: Beyond Progressivism*, 83.

⁸⁴ As Strum explains, Brandeis maintained that “[t]he destruction of competition minimized the impetus to seek better products, better services, and greater efficiency: bigness was bad for creativity.” *Brandeis On Democracy*, 9.

⁸⁵ *Ibid.*, 61.

consumer goods, it entailed the economies of scale, the enhanced bargaining power, and the surplus capital that, in the view of the Rooseveltians, only large-scale enterprise could provide.⁸⁶

The interests of the small business, as such, did not always align with those of consumers. The demands of freedom did not always accord with those of material prosperity. For Brandeis, the untrammelled market stood not as a force for liberation, but rather as a system of centralized production and mass consumption, corrosive both to the small business and to the ideal of freedom it embodied.⁸⁷ It fell to government to right the balance between the consumer and the small enterprise. In Brandeisian thought, government stood as the handmaiden of the independent enterprise, from small manufacturing or retail concerns to the craftsmen and artisans who had long populated the *petite bourgeoisie*. “The inequality between the great corporations with huge resources and the small competitor . . . is such that ‘equality before the law’ will no longer be secured merely by supplying adequate machinery for enforcing the law[,]” Brandeis asserted. “To prevent oppression and injustice the Government must be prepared to lend its aid.”⁸⁸ In this role, government helped to resist the tide of centralized production and mass consumption and to preserve the vitality of the independent proprietor.

Nowhere was Brandeis’s conception of government as an ally of small business more apparent than in his approach to antitrust regulation. Indeed, Brandeis envisaged the Federal Trade Commission not as the custodian of a consumer society but rather as a vehicle for

⁸⁶ See *Ibid.*, 158-60; Strum, *Brandeis: Beyond Progressivism*, 83.

⁸⁷ McCraw describes Brandeis’s view of the conflict between the consumer and the independent enterprise thusly: “Brandeis’ lament about the decline of autonomous individualism aptly illustrated one of the poignant themes of modern culture in an age of big business. This theme was the conflict between the small producer’s values, which had characterized nineteenth-century American culture, and the emerging consumerist values of a twentieth-century mass society. . . . His anticonsumption sensibilities led him to . . . a feeling of contempt for the manipulated consumer.” McCraw, *Prophets of Regulation*, 106.

⁸⁸ McCraw, *Prophets of Regulation*, 112.

strengthening small-scale enterprise. “We shall erect a great bulwark against the trusts,” Brandeis maintained, “when we thus offer to the small business man what is procurable only by the great industrial concerns through their research laboratories and bureaus of information.”⁸⁹ The Commission, he hoped, would serve as a forum in which small concerns could pool information and resources in an effort to counter the power of the great trusts.⁹⁰ For the Rooseveltian Progressives, the function of government was to harness the power of the trusts for the benefit of the consuming public. For Brandeis, by contrast, the role of government was to destroy the trusts and to nurture the modest, independent enterprise.⁹¹

This willingness to sacrifice the consumer to the small businessman came into focus in battles over the ability of big business to slash prices in an effort to force competitors out of a market. Brandeis was deeply troubled by the ability of large distributors and wholesalers to command substantial discounts from manufacturers.⁹² Such discounts were ostensibly a boon to consumers, since the savings would in theory be passed onto them in the form of lower prices.⁹³

But Brandeis understood that the market power of big business, however advantageous to the

⁸⁹ *Ibid.*, 134.

⁹⁰ McCraw explains the particular functions that Brandeis envisioned for the Commission thusly: “Brandeis himself had wanted the Federal Trade Commission to function as a clearinghouse of information for the benefit of small business. . . . Along with helping trade associations, the FTC was urged to perform research and development functions on behalf of small business. . . . In effect, he sought to offset the power of center firms through government assistance to peripheral firms. . . . [T]he Federal Trade Commission would become a central fact-gathering bureau for all types of small business. It would develop and make available to them reliable sets of statistics showing standard operating ratios, typical costs and prices, and characteristic profit margins. As an overarching trade association, it would perform for peripheral firms the kind of informational and research functions only center firms were customarily able to afford.” McCraw, *Prophets of Regulation*, 133.

⁹¹ “Nor,” McCraw observes, “is there anything in Brandeis’ many discussions of the Federal Trade Commission . . . to suggest that he conceived of it as a consumer-protection agency. Rather, he confined his attention to the small producer, wholesaler, and retailer.” McCraw, *Prophets of Regulation*, 134.

⁹² See *Ibid.*, 101-08

⁹³ See *Ibid.*

consumer, doomed smaller firms that could not keep pace with their larger competitors.⁹⁴ The retail department store, for example, promised unprecedented access to consumer goods once considered luxuries. But it also crowded out smaller retailers whose limited resources and market power placed them at a fatal disadvantage.⁹⁵

For many of Brandeis's Progressive contemporaries, the demise of the small retailer was a natural incident of economic progress. Even Wilson, whom Brandeis eventually converted to his crusade against corporate bigness, once extolled big business for "adding so enormously to the economy and efficiency of the nation's productive work" and characterized the great trusts as "the most convenient and efficient instrumentalities of modern business."⁹⁶ For Brandeis, however, the decline of small business augured a slide into industrial despotism, with wealth and power concentrated in an ever-shrinking elite. He was determined, as such, to stop the practice of price slashing and to gird independent businesses against the rising pressures of the market.

During a congressional hearing for a price-fixing bill that he helped craft, Brandeis called for prohibiting the quantity discounts that were the lifeblood of the "capitalistic combinations—the mail-order houses, existing chains of stores, and the large department stores."⁹⁷ Thomas K. McCraw gives a sense of just how heterodox was Brandeis's proposal:

The only reason department stores could undersell their smaller competitors, Brandeis went on to say, was that they bought in bulk and availed themselves of quantity discounts. This practice, he told the committee, gave an unfair advantage to large retailers and therefore should be stopped. Here Congressman Alben

⁹⁴ See *Ibid.*

⁹⁵ As McCraw writes, "[T]he net effect of 'trustification' in any given industry might well be the reduction of prices and the enhancement of consumer welfare. . . . For Brandeis himself, the economic effects mattered far less than the social and political ones. He focused not on increases in consumer welfare but on decreases in the autonomy of small producers." McCraw, *Prophets of Regulation*, 96.

⁹⁶ Melvin I. Urofsky, *Louis D. Brandeis and the Progressive Tradition* (Boston: Little, Brown and Company, 1981), 68.

⁹⁷ McCraw, *Prophets of Regulation*, 103.

Barkley of Kentucky, knowing that quantity discounts were as old as business itself, could not believe he had heard Brandeis correctly. But Brandeis remained adamant: he predicted that quantity discounts, being ‘fraught with very great evil,’ soon would be outlawed.⁹⁸

That Brandeis could maintain a position so at odds with economic orthodoxy attested to the relative positions of freedom and prosperity within Brandeis’s larger hierarchy of values. “For Brandeis and his allies,” McCraw observes, “to be simultaneously against bigness and for consumers was extremely difficult.”⁹⁹ Brandeis was against bigness before he was for consumers; he cherished freedom over prosperity. As McCraw argues, “to the extent that consumers voted with their pocketbooks for department stores and mail-order houses, the fight against these large retailers became a fight against consumers as well.”¹⁰⁰

Brandeis’s opposition to consumerism and economic centralization upended the duality that equated freedom with the market and government with constraint. Without regulated competition, Brandeis argued, the market gave rise to corporate behemoths that stamped out smaller competitors. Size meant greater resources and enhanced market power. The independent enterprise tended to buckle under these competitive pressures, opting either to combine with competitors or to close up shop.¹⁰¹ In theory, the giant firms that survived would pass the benefits of large-scale enterprise onto consumers—provided, that is, that they were effectively regulated on the Rooseveltian model. But the demise of the independent shop meant increasing economic centralization, which, in turn, hastened the transition from a producer to a

⁹⁸ *Ibid.*, 104.

⁹⁹ *Ibid.*, 105.

¹⁰⁰ *Ibid.*, 106.

¹⁰¹ “May not these hardwood lumber concerns, frustrated in their efforts to rationalize competition, be led to enter the inviting field of consolidation?” Brandeis asked in dissent in *American Column Co. v. United States*. “And, if they do, may not another huge trust, with highly centralized control over vast resources, natural, manufacturing, and financial, become so powerful as to dominate competitors, wholesalers, retailers, consumers, employees, and, in large measure, the community?” Rosen, *Louis D. Brandeis: American Prophet*, 108.

consumer society. The sturdy entrepreneur gave way to the pliant employee; the vital producer degenerated into the inert consumer. “[Brandeis] opposed the trusts not only because they were inefficient but because they were also inhuman[,]” writes Philippa Strum. “They . . . turned people into automatons rather than human beings with the leisure to fulfill and educate themselves.”¹⁰² For Brandeis, no manner of prosperity could justify such a devolution.

This is not to say that Brandeis believed that a decentralized economy injured the consumer. For Brandeis, vigorous competition between independent enterprises that genuinely cared about the integrity of their products furthered the long-term interests of the consumer.¹⁰³ Brandeis thus avoided any direct confrontation with the trade-off between consumer prosperity and the maintenance of independent enterprise. There can be little doubt, however, that his sympathy lay chiefly with the small businessman and not with the consumer.¹⁰⁴

Brandeis’s desire to ally government to small business manifested itself in his efforts to persuade Congress to exempt small retailers and manufacturers from antitrust restrictions. Large retailers and distributors had long leveraged their market power to drive hard bargains with smaller manufacturers. This, in turn, squeezed those manufacturers to the point of collapse.¹⁰⁵ Small retailers, lacking the market power of their larger competitors, could not compete with the latter’s cut-rate prices.¹⁰⁶ This downward pressure on prices forced small retailers and manufacturers to shut down or to merge with other firms. “Some avenue of escape must be sought by them,” Brandeis argued, “and it may be found in combination. . . . The process of exterminating the small independent retailer already hard pressed by capitalistic combinations—

¹⁰² Strum, *Louis D. Brandeis: Justice for the People*, 151.

¹⁰³ See Strum, *Brandeis: Beyond Progressivism*, 85.

¹⁰⁴ See McCraw, *Prophets of Regulation*, 103-07.

¹⁰⁵ See *Ibid.*, 101-08

¹⁰⁶ See *Ibid.*

the mail-order houses, existing chains of stores, and the large department stores—would be greatly accelerated by such a movement.”¹⁰⁷ For Brandeis, the business itself was not the sole casualty here. The ideal of the autonomous entrepreneur, free to exercise his creativity and ingenuity in the marketplace, fell victim to economic concentration as well. Brandeis feared that the vibrancy and self-sufficiency of the artisan and the independent tradesman were devolving into the sterility and servility of the wage laborer and the consumer.¹⁰⁸

If small retailers and manufacturers were to arrest the trend toward consolidation, they had to stand in solidarity against their larger competitors. Without the fetters of antitrust law, small retailers and manufacturers could pool information about prices, profits, and negotiations with distributors. To counter the might of the great trusts, independent firms could agree not to sell to distributors or to consumers below a given price. Brandeis distinguished such “price maintenance” from the practice of “price cutting.”¹⁰⁹ The corporate goliaths engaged in price cutting—that is, slashing prices to undercut smaller competitors and force them out of the market. For Brandeis, price cutting was “the most potent weapon of monopoly—a means of killing the small rival to which the great trusts have resorted most frequently.”¹¹⁰

Cooperation among independent firms, by contrast, aimed at price maintenance—that is, the fixing of prices that allowed small businesses to survive. “The prohibition of price maintenance,” Brandeis contended, “imposes upon the small and independent producers a serious handicap.”¹¹¹ Price cutting had to do with raw market power. Price maintenance aimed

¹⁰⁷ McCraw, *Prophets of Regulation*, 103.

¹⁰⁸ See Rosen, *Louis D. Brandeis: American Prophet*, 76-77.

¹⁰⁹ Strum, *Brandeis: Beyond Progressivism*, 85.

¹¹⁰ *Ibid.*

¹¹¹ McCraw, *Prophets of Regulation*, 103.

at fair compensation for the blood, sweat, and tears that went into a small business.¹¹² The distinction was that between “a manufacturer fixing the retail selling price of an article of his own creation and to which he has imparted his reputation, and the fixing of prices by a monopoly or by a combination tending to monopoly.”¹¹³

Such coordination between small enterprises was illegal under the antitrust laws that Brandeis himself had championed. But Brandeis did not oppose such practices in principle. Rather, he opposed them when they yielded consolidation and centralization. When they advanced his ideal of the independent small enterprise, he thought them indispensable. He sought, as such, to “stimulate[], through the fixed price, the little man as against the department store, and as against the large unit which may otherwise monopolize that trade.”¹¹⁴ If, moreover, preventing price cutting entailed harm to the consumer, such was simply the cost of preserving industrial freedom.¹¹⁵

Ultimately, small retailers and manufacturers remained within the ambit of the antitrust laws. But it is important to understand what Brandeis’s efforts to exempt small businesses from antitrust restrictions revealed about his vision of government. For Brandeis, government was more than the disinterested referee or “night watchman” that appears in the libertarian conception of the state. Government was not a neutral observer in the struggle between the small businessman and the economic goliaths that produced a deadening melange of wage laborers,

¹¹² As Strum observes, “Brandeis differentiated price maintenance by a producer, who had a stake in the quality and reputation of his product, from price cutting and price fixing.” Strum, *Brandeis: Beyond Progressivism*, 85.

¹¹³ Rosen, *Louis D. Brandeis: American Prophet*, 86.

¹¹⁴ McCraw, *Prophets of Regulation*, 103.

¹¹⁵ See McCraw, *Prophets of Regulation*, 101-08.

middle managers, and corporate executives.¹¹⁶ To the contrary, Brandeis marshaled the power of government to elevate small-scale enterprise and to hamstring the corporate titans that stifled economic freedom. In championing the ideal of the independent enterprise against the forces of economic concentration, government acted as a weapon against economic servitude and as a force for human liberation. This was an affirmative, rather than a negative, conception of the state—and it was a vision of government as an organ of freedom rather than of constraint.

In that same vein, the powers to tax and to regulate appear in Brandeis's thought not as tools of oppression but rather as means of emancipation from the tyranny of unfettered capitalism. Brandeis's dissent in *Lee v. Liggett* is particularly instructive. In the course of defending a Florida law that imposed heavier license fees on chain stores than on independent businesses, Brandeis enunciated his conception of government as the handmaiden of freedom:

There is a widespread belief that . . . by the control which the few have exerted through giant corporations individual initiative and effort are being paralyzed, creative power impaired and human happiness lessened; that the true prosperity of our past came not from big business, but through the courage, the energy, and the resourcefulness of small men; that only by releasing from corporate control the faculties of the unknown many, only by reopening to them the opportunities for leadership, can confidence in our future be restored and the existing misery be overcome; and that only through participation by the many in the responsibilities and determinations of business can Americans secure the moral and intellectual development which is essential to the maintenance of liberty.¹¹⁷

This passage reflects the same preoccupation with mind and spirit that courses through libertarian thought. But where libertarians warn against the enfeebling tendencies of the welfare and regulatory state, Brandeis saw government as a means of fortifying the human psyche against the enervating influence of untrammelled capitalism.

¹¹⁶ Brandeis singled out the investment banker in particular as “[t]he dominant element in our financial oligarchy.” “Associated banks, trust companies, and life insurance companies are his tools[,]” Brandeis averred. “Controlled railroads, public service and industrial corporations are his subjects.” Brandeis, *Other People's Money*, 5.

¹¹⁷ Rosen, *Louis D. Brandeis: American Prophet*, 110.

The thrust of Brandeis's argument in *Lee* was not that mammoth corporations thwarted the individual's pursuit of material well-being. Brandeis's emphasis in *Lee* lay instead with the condition of the human psyche and spirit. "Giant corporations," Brandeis averred, were sapping the vim and vigor of a free mind and spirit—the "individual initiative and effort" that unrestrained capitalism had "paralyzed."¹¹⁸ "[T]he courage, the energy, the resourcefulness of small men" were the human properties that Brandeis most cherished, and these were antithetical to the servility and passivity inherent in the twin ills of consumerism and economic centralization.¹¹⁹ "[O]nly by releasing from corporate control the faculties of the unknown many," Brandeis believed, could the human mind and spirit remain vital.¹²⁰

For Brandeis, the ideal of the small businessman promised to deliver mind and spirit from the clutches of "corporate control."¹²¹ Only in small economic units could "the unknown many" seize the "opportunities for leadership" that were "essential to the maintenance of liberty."¹²² In *Lee*, Brandeis traces a through line that structures the entire body of his political and economic thought: responsibility drives maturation, which, in turn, undergirds freedom. For Brandeis, the unbridled market stunted this process. By denying to "small men" "participation in the responsibilities and determinations of business," the unregulated market subverted freedom.¹²³ The remedy, Brandeis contended, lay with a system of regulated competition in which government ensured both that the aspiring entrepreneur could thrive and that enterprises remained small enough for workers themselves to share in the "responsibilities and

¹¹⁸ *Ibid.*

¹¹⁹ *See Ibid.*

¹²⁰ *See Ibid.*

¹²¹ *See Ibid.*

¹²² *See Ibid.*

¹²³ *See Ibid.*

determinations of business.”¹²⁴ Only then could the “unknown many” achieve the “moral and intellectual development which is essential to the maintenance of liberty.”¹²⁵

The irony of Brandeis’s contest with the champions of *laissez-faire* capitalism was that both drew in some measure from the same intellectual well. In particular, both claimed to be carrying forward the legacy of the American Founding. “Those who won our independence,” Brandeis proclaimed in dissent in *Whitney v. California*, “believed that the final end of the State was to make men free to develop their faculties They valued liberty both as an end and as a means. They believed liberty to be the secret of happiness and courage to be the secret of liberty.”¹²⁶ But where proponents of *laissez faire* insisted on strict adherence to the letter of the Constitution, Brandeis sought to revivify the spirit of the Founding in the light of the 20th century.¹²⁷

For Brandeis, reflexive enforcement of contract and property rights eroded the ideal of freedom. Rigid application of Founding Era maxims had to give way to a dynamic adaptation of the Founding spirit.¹²⁸ What, then, were the Founding ideals that Brandeis sought to resurrect for a new age? They were the ideals of Jeffersonian democracy, and with those ideals came a vision of freedom grounded not in capitalism but in notions of self-ownership and self-realization. A discussion of those ideals follows, with the aim both of locating Brandeis’s vision of freedom in

¹²⁴ See *Ibid.*

¹²⁵ See *Ibid.*

¹²⁶ Strum, *Brandeis: Beyond Progressivism*, 126-27.

¹²⁷ For a discussion of the ways in which “Lochner Era” courts invoked Founding Era thought, see Howard Gillman, *The Constitution Besieged: The Rise and Demise of Lochner Era Police Powers Jurisprudence* (Durham, North Carolina: Duke University Press, 1993), 22-33.

¹²⁸ As Jeffrey Rosen writes, “[Brandeis] attempted to translate the values of the framers of the Constitution into an age of technologies and mass-production methods they could not have imagined.” Rosen, *Louis D. Brandeis: American Prophet*, 15.

a larger political tradition and of reaching a clearer understanding of its historical and conceptual roots.

g. Echoes of Jefferson

In Brandeis's vision of the sturdy and independent small businessman, there was an unmistakable echo of Jefferson's ideal of the yeoman farmer.¹²⁹ In his political and economic thought, Brandeis sought to adapt Jeffersonianism to the 20th century. As Harold Laski remarked in 1922, "[Brandeis] is really a Jeffersonian Democrat, trying to use the power of the State to enforce an environment in which competition may be really free and equal."¹³⁰ But Brandeis encountered obstacles with which Jefferson did not need to contend.¹³¹ In Jefferson's 18th century Virginia, arable land was plentiful, and a society of modestly prosperous freeholders was in reach.¹³² According to Jefferson, how the fledgling republic harnessed its bounteous frontier would determine the long-term survival of the ideals of the American Revolution. For Jefferson believed that widespread ownership of productive land was the surest guarantor of freedom.¹³³

In Jefferson's vision of an agrarian society, the freeholder-farmer depended not on the goodwill of bosses and factory owners but rather on his own initiative and ingenuity.¹³⁴ The yeoman farmer answered only to his own conscience. For Jefferson, this spirit of independence

¹²⁹ "[Brandeis's] unarticulated goal," Strum writes, "was a method by which the Jeffersonian imperative of economic independence could be achieved in the industrial age." Strum, *Brandeis: Beyond Progressivism*, 30.

¹³⁰ *Ibid.*, 91.

¹³¹ See Urofsky, *Louis D. Brandeis and the Progressive Tradition*, v.

¹³² See Foner, *The Story of American Freedom*, 12.

¹³³ *Ibid.*, 22.

¹³⁴ See Richard K. Matthews, *The Radical Politics of Thomas Jefferson: A Revisionist View* (Lawrence, Kansas: University Press of Kansas, 1984), 39.

meant the difference between a free and virtuous citizenry and a people in the throes of moral degeneration:

Those who labour in the earth are the chosen people of God, if ever he had a chosen people, whose breasts he has made his peculiar deposit for substantial and genuine virtue. It is the focus in which he keeps alive that sacred fire, which otherwise might escape from the face of the earth. Corruption of morals in the mass of cultivators is a phaenomenon [*sic*] of which no age nor nation has furnished an example. It is the mark set on those, who not looking up to heaven, to their own soil and industry, as does the husbandman, for their subsistence, depend for it on the casualties and caprice of customers. Dependance [*sic*] begets subservience and venality, suffocates the germ of virtue, and prepares fit tools for the designs of ambition.¹³⁵

Jefferson held an abiding faith in the liberating power of property ownership.¹³⁶ This faith lay beneath his proposal to enshrine in the Virginia Constitution a guarantee of fifty acres of land to every white male of majority age in the Commonwealth of Virginia. This proposal revealed as much about his vision of freedom as did his vaunted prose in the Declaration of Independence.¹³⁷

Jefferson's belief in the emancipating potential of broad-based land ownership emerged again in 1803, when then President Jefferson purchased the territory of Louisiana from Napoleon. Jefferson doubted whether the acquisition comported with the Constitution, worrying that the massive land purchase both stretched the power of the executive and clashed with his philosophy of narrowly construing the powers granted to the federal government under the Constitution.¹³⁸ But Jefferson hoped that the Louisiana Purchase would lay the foundation for a

¹³⁵ *Ibid.*

¹³⁶ See *Ibid.*, 47.

¹³⁷ According to J.G.A. Pocock, Jefferson feared a society in which “the reservoir of land must be exhausted and the expansion of virtue will no longer keep ahead of the progress of commerce. . . . When that point is reached, the process of corruption must be resumed; men will become dependent upon each other in a market economy and dependent upon government in great cities.” John Greville Agard Pocock, *The Machiavellian Moment: Florentine Political Thought and the Atlantic Republican Tradition* (Princeton: Princeton University Press, 1975), 541.

¹³⁸ See Garrett Ward Sheldon, *The Political Philosophy of Thomas Jefferson* (Baltimore: The Johns Hopkins University Press, 1991), 95-99.

nation of independent landowners, and that vision ultimately trumped Jefferson's preferred mode of constitutional interpretation.¹³⁹ Like Brandeis, Jefferson saw freedom in substantive, rather than in formal, terms. Just as Brandeis elevated self-determination for workers and small businessmen over adherence to "*laissez-faire*" economics, so too did Jefferson subordinate "strict constructionism" to his vision of a free society.¹⁴⁰ For both Jefferson and Brandeis, rigid adherence to philosophical formulae was no substitute for real, flesh-and-blood freedom.

Jefferson's pastoral idyll collided with Alexander Hamilton's vision of an industrial society rooted in manufacturing, with power residing not in the open countryside but in the congested urban centers that were the breeding grounds for an emerging capitalist economy.¹⁴¹ "I am savage enough," Jefferson wrote, "to prefer the woods, the wilds, and the independence of Monticello, to all the brilliant pleasures of this gay capital. I shall therefore rejoin myself to my native country with new attachments, with exaggerated esteem for its advantages, for tho' there is less wealth there, there is more freedom, more ease and less misery."¹⁴² Here, Jefferson offers an earlier iteration of Brandeis's insight that wealth and freedom were not merely distinct goods; they were potentially conflicting ones as well. "I don't want money or property most," Brandeis explained, echoing Jefferson. "I want to be free."¹⁴³

For Jefferson, as for Brandeis, freedom had a spiritual and psychological underpinning, and just as Brandeis believed that the twin evils of consumerism and economic centralization

¹³⁹ See *Ibid.*

¹⁴⁰ "As long as land is available," writes Matthews, "there is no economic dependence; as long as the laborer has the option of meeting his needs on his own land, he can freely choose to leave the land and enter a wage-labor situation that is not automatically based on exploitation: that is, a wage-labor relationship in which the laborer 'may extract' for his services 'such compensation' as to 'afford a comfortable subsistence.'" Matthews: *The Radical Politics of Thomas Jefferson*, 32.

¹⁴¹ See Sheldon, *The Political Philosophy of Thomas Jefferson*, 78.

¹⁴² Matthews, *The Radical Politics of Thomas Jefferson*, 31.

¹⁴³ Rosen, *Louis D. Brandeis: American Prophet*, 46.

enervated mind and spirit, so too did Jefferson fear that the dual ills of urbanization and industrialization would sap human vitality and creativity. “The mobs of great cities add just so much to the support of pure government,” argued Jefferson, “as sores do to the strength of the human body.”¹⁴⁴ The urban wage laborer was the antithesis of Jefferson’s yeoman farmer. Where the yeoman farmer relied only on his own labor, the wage laborer depended on the goodwill of his employer. Where the yeoman farmer enjoyed a sphere of autonomy within which he was free to determine the pace and character of his labor, the wage laborer executed the commands of floor bosses and factory owners. Where the yeoman farmer lived and labored in the wide-open expanse of the countryside, the wage laborer resided in cramped tenements, toiling amid the dreary backdrop of urban squalor.

For Jefferson, the yeoman farmer was free in the physical sense, in that he did not labor under the despotism of the floor supervisors and factory owners who ruled the nation’s industrial centers. Like Brandeis, however, Jefferson did not conceive of freedom in purely physical terms. For Jefferson, Richard K. Matthews writes, “[m]an was meant to be much more than either a mere consumer or an appropriator.”¹⁴⁵ Jefferson’s yeoman farmer was free in mind and spirit as well as in body. The wage laborer was listless and servile, battered by a life of submission and subordination; the yeoman farmer was vigorous and independent, fortified by the experience of autonomy and self-reliance.¹⁴⁶ The world of the yeoman farmer was one of his own making. The world of the wage laborer, by contrast, came to him already made. For Jefferson, as for Brandeis, the experience of self-creation vivified the human psyche; to inhabit a world made by others and controlled from above enervated mind and spirit. The yeoman farmer did not

¹⁴⁴ Matthews, *The Radical Politics of Thomas Jefferson*, 40-41.

¹⁴⁵ *Ibid.*, 26.

¹⁴⁶ See Matthews, *The Radical Politics of Thomas Jefferson*, 19-52.

passively man an assembly line; he actively harnessed the raw material of existence through his powers of creativity and ingenuity.¹⁴⁷

Like Jefferson, Brandeis revered the steely men and women who worked the earth. Brandeis exalted the self-sustaining farmer whose world sprang not from alien forces but from his own hands and mind. Invoking Scottish philosopher Thomas Carlyle, Brandeis extolled the “toil-worn craftsman who conquers the earth and him who is seen toiling for the spiritually indispensable.”¹⁴⁸ But Brandeis’s admiration for the yeoman farmer of Jeffersonian lore crystallized not in his vision for America, but rather in the homeland he envisaged for the Jewish people in Palestine. Brandeis saw in Palestine a safe haven for a beleaguered people. Just as significantly, however, he imagined Palestine as a proving ground for Jeffersonianism.¹⁴⁹

h. Tabula Rasas: Brandeisian Experiments in Jeffersonianism

By the 20th century, the United States had transitioned from small-scale agriculture to heavy industry. In the United States, as such, Brandeis did not seek to implement the Jeffersonian ideal in its original iteration, for that particular manifestation of the Jeffersonian vision was no longer practicable.¹⁵⁰ Rather, Brandeis sought to adapt Jeffersonianism to 20th century conditions. Those conditions often impeded the task of adaptation. Large-scale capitalism had taken root in America, and Jefferson’s vision of a nation of independent freeholders was thus no longer practicable. Indeed, the challenge of dislodging large-scale capitalism and resurrecting a society more in line with Jefferson’s ideal bedeviled Brandeis his entire life. An exchange between Brandeis and his law clerk, Harry Shulman, is instructive: “I

¹⁴⁷ See *Ibid.*

¹⁴⁸ See Rosen, *Louis D. Brandeis: American Prophet*, 155.

¹⁴⁹ See Strum, *Brandeis: Beyond Progressivism*, 105, 113.

¹⁵⁰ *Ibid.*, 155.

suggested to [Brandeis][,]" writes Shulman, "that [limiting the size of corporations by taxation] would be . . . attempting to do the impossible, to turn the clock back. His reaction was immediate and spirited: why shouldn't we turn the clock back?"¹⁵¹

In Brandeis's mind, Palestine offered not only a refuge for an embattled people but also a blank canvass, a pristine landscape into which capitalism had not yet penetrated. In Palestine, land was plentiful, and Brandeis hoped that Jewish settlers would develop the independence and self-reliance that Jefferson had envisioned for the yeoman farmer of 18th century America. In Palestine, there were no corporate titans to thwart aspiring enterprises or to entrench a culture of mass consumption. Nor were there large factory owners or floor supervisors before whom workers would be forced to grovel.¹⁵²

For Brandeis, the fact that Palestine was not rich in natural resources was a blessing, as it meant that the capitalists who had subverted the Jeffersonian ideal in America would steer clear of the Jewish homeland. Brandeis urged the Zionist movement to resist large-scale industrial development—for only if Palestine escaped the rule of capital could Jewish settlers retain their material independence, their capacity for self-creation, and their integrity as free people.¹⁵³ For Brandeis, Palestine beckoned as a haven from the hierarchy and dependency inherent in large-scale capitalism. In Palestine, individuals could nurture the strength of mind and spirit that undergirded true freedom.¹⁵⁴

Jewish settlement of Palestine was not the only occasion when Brandeis undertook to safeguard an experiment in Jeffersonianism against capitalist exploitation. When the

¹⁵¹ *Brandeis On Democracy*, 196.

¹⁵² See Strum, *Brandeis: Beyond Progressivism*, 106-07.

¹⁵³ See Urofsky, *Louis D. Brandeis and the Progressive Tradition*, 95; Strum, *Brandeis: Beyond Progressivism*, 106-14.

¹⁵⁴ See Urofsky, *Louis D. Brandeis and the Progressive Tradition*, 93; Strum, *Brandeis: Beyond Progressivism*, 106-14.

administration of William Howard Taft announced that it would open up the territory of Alaska to corporate development, Brandeis condemned the decision and resolved to keep large-scale capitalism out of the territory. Alaska, Brandeis declared, was to be a land not of capitalists and wage laborers, but rather of independent citizen-landowners in the Jeffersonian mold.¹⁵⁵ “How would this do for the Progressive slogan,” Brandeis wrote to Progressive champion Robert LaFollette, “Alaska; the Land of Opportunity. Develop it by the People, for the People. Do not let it be exploited by the Capitalists, for the Capitalists.”¹⁵⁶

Like the sturdy settlers who sought a Jewish homeland in Palestine, the intrepid souls who forged new lives on the Alaskan frontier were not to be servants of capital. “We are not dealing here,” Brandeis averred, “with a question of the conservation of natural resources merely: it is the conservation of manhood.”¹⁵⁷ Alaskans, Brandeis insisted, were to be their own masters:

We must devise some system by which those who are willing to go to Alaska, with a view to working there and developing its resources, shall have not only the assurance of fair treatment, but the opportunity of operating without undue oppression through monopolistically inclined competitors. . . . In other words, . . . the settlers of Alaska should get the increment in value which they earn, through their investment and their own labor, and the sacrifices attendant upon settling in a new country¹⁵⁸

In Alaska, as in Palestine, Brandeis sought to preserve a sphere within which mind and spirit could roam free, unburdened by the hierarchy and congestion of urban life in the United States. He was determined, moreover, to protect that sphere against the enslaving and enervating influence of large-scale capitalism:

¹⁵⁵ Strum: *Brandeis: Beyond Progressivism*, 108, 160.

¹⁵⁶ *Brandeis on Democracy*, 45.

¹⁵⁷ Strum, *Louis D. Brandeis: Justice for the People*, 138.

¹⁵⁸ *Brandeis on Democracy*, 44.

Development of transportation and other facilities by the capitalists would, in a way, seriously impair development, because to give them a return which would seem to them adequate would entail rates which would be oppressive to the people of Alaska, and would, in themselves, tend to retard development and the opening up of opportunities to the sturdy, courageous men who are willing to take up their residence in the territory.¹⁵⁹

In Brandeis's vision for Alaska and Palestine, capitalism did not promote freedom. To the contrary, the untrammled market subverted freedom.

In 20th century America, the unsullied frontier had receded, and a landscape cluttered with entrenched privileges had emerged in its stead. Brandeis could not guarantee to every American fifty acres of land, as Jefferson had done for white males in Virginia.¹⁶⁰ Instead, Brandeis sought to transpose Jefferson's 18th century vision of small, autonomous landowners to the realities of the 20th century. For Brandeis, the figure of the independent small businessman offered the closest contemporary analogue to the yeoman farmer of Jeffersonian lore. Like Jefferson's yeoman farmer, the independent small businessman was sovereign within his own modest sphere of existence. The habits of servility and subordination that large-scale enterprise had engendered in urban wage laborers were foreign to him. His were the habits of self-reliance, ingenuity, and creativity, the hallmarks of a vibrant mind and spirit.¹⁶¹

What, then, of the majority of Americans who would never become independent artisans, shopkeepers, or manufacturers? How were they to seize control of their lives? How were they to cultivate the vitality of mind and spirit that was essential to true freedom? Brandeis diagnosed the problem thusly:

Half a century ago, nearly every American boy could look forward to becoming independent as a farmer or mechanic, in business or professional life Today most American boys have reason to believe that throughout life they will work in

¹⁵⁹ *Ibid.*, 43.

¹⁶⁰ See Urofsky, *Louis D. Brandeis and the Progressive Tradition*, 20.

¹⁶¹ See Rosen, *Louis D. Brandeis: American Prophet*, 76-77.

some capacity as employees of others, either in private or public business; and a large percentage of women occupy like positions.¹⁶²

The solution, Brandeis believed, lay in “industrial democracy.”

IV. FREEDOM OF THE DEMOS

a. Reinvigorating Jefferson’s Ward Republic

Libertarians have long been ambivalent about democracy. As Hayek explained:

We have no intention . . . of making a fetish of democracy. It may well be true that our generation talks and thinks too much of democracy and too little of the values which it serves. . . . Democracy is essentially a means, a utilitarian device for safeguarding internal peace and individual freedom. As such it is by no means infallible or certain. Nor must we forget that there has often been much more cultural and spiritual freedom under an autocratic rule than under some democracies¹⁶³

The struggle of the individual against the collective—of the brilliant and creative iconoclast against the unthinking and destructive masses—has surfaced time and again as a motif in libertarian thought. “[T]he revolt of the individual against the species,” Hayek declared, “was indeed the force which built our civilization.”¹⁶⁴

This opposition between the individual and the collective maps neatly onto the equation of capitalism with freedom and government with constraint.¹⁶⁵ For libertarians, the untrammelled market embodies the heroic spirit of the individual and guards against the tyranny of the mob. Prior to the spread of free markets, Hayek argued, “the beliefs of the great majority on what was right and proper were allowed to bar the way of the individual innovator.”¹⁶⁶ The state, by contrast, represents the triumph of the collective over the individual, the smothering of

¹⁶² Urofsky, *Louis D. Brandeis and the Progressive Tradition*, 21.

¹⁶³ Hayek, *The Road to Serfdom*, 110.

¹⁶⁴ *Ibid.*, 70.

¹⁶⁵ “The [libertarian’s] task,” argued Rothbard, “is to demonstrate . . . that not only the emperor but even the ‘democratic’ State has no clothes.” Rothbard, *For a New Liberty*, 30.

¹⁶⁶ Hayek, *The Road to Serfdom*, 70.

individuality by a crushing uniformity. “The characteristic feature of action through political channels is that it tends to require or enforce substantial conformity[.]” wrote libertarian economist Milton Friedman. “The great advantage of the market, on the other hand, is that it permits wide diversity.”¹⁶⁷ In this contest between the individual and the collective, the individual embodies the spirit of freedom. The collective oppresses that spirit. As Hayek wrote:

If the “community” or the state are prior to the individual, if they have ends of their own independent of and superior to those of . . . individuals, only those individuals who work for the same ends can be regarded as members of the community. It is a necessary consequence of this view that a person is respected only as a member of the group, that is, only if and in so far as he works for the recognized common ends, and that he derives his whole dignity only from this membership and not merely from being a man.¹⁶⁸

Brandeis discerned no such antagonism between the individual and the community. “The right of development on the part of the group is essential to the full enjoyment of rights by the individual,” he insisted. “We can scarcely conceive of an individual German or Frenchman living and developing without some relation to the contemporary German or French life and culture.”¹⁶⁹ The logic of Brandeis’s argument here is that self-determination is both a collective and an individual right, for “the individual is dependent for his development (and his happiness) in large part upon the development of the group of which he forms a part.”¹⁷⁰ For Brandeis, individual freedom was therefore inseparable from democracy. Government, in turn, stood as an organ for expressing the will of the *demos* and thus as an instrument of both individual and

¹⁶⁷ Friedman, *Capitalism and Freedom*, 15. Hayek, too, admonished against this devolution into sameness. Under a planned economy, he argued, “we shall all have to conform to the standards which the planning authority must fix in order to simplify its task. To make this immense task manageable, it will have to reduce the diversity of human capacities and inclinations to a few categories of readily interchangeable units [T]he individual would more than ever become a mere means, to be used by the authority in the service of such abstractions as the ‘social welfare’ or the ‘good of the community.’” See Hayek, *The Road to Serfdom*, 130.

¹⁶⁸ Hayek, *The Road to Serfdom*, 162.

¹⁶⁹ Strum, *Brandeis: Beyond Progressivism*, 113.

¹⁷⁰ *Ibid.*

collective freedom.¹⁷¹ “The goal,” writes Strum, “was the individual; the method was the organized community; the two were inextricably connected.”¹⁷² Unrestrained capitalism, by contrast, produced atomized workers in thrall to their employers and left the wider public subordinate to a few industrialists and financiers.

For Brandeis, the ultimate purpose of a society—the end to which all of society’s other functions were but means—was the fullest possible development of the individual.¹⁷³ Material well-being and freedom of action were prerequisites for such development, but these were only the means to a more elevated condition of mind and spirit. This more exalted conception of freedom entailed individual self-actualization, but it also rested on a notion of man as a “social animal,” in Aristotelian terms. “Brandeis regarded democratic government as necessary,” Strum writes, “because, without it, human fulfillment was impossible.”¹⁷⁴

This conception of individual freedom as inextricable from the maintenance of a vibrant *demos* underlay Brandeis’s vision for a Jewish homeland. Brandeis imagined Palestine as a land where the individual would enjoy a sphere of autonomy.¹⁷⁵ Equally important, however, Brandeis conceived of Palestine as a project to revive the bonds between the individual and the community. The vulgar commercialism of large-scale capitalism had eroded those connective

¹⁷¹ That Brandeis saw the state as a potential threat to freedom cannot be denied—for Brandeis saw the perils of government power even as he recognized its potential. But Brandeis also conceived of government as the means by which a people asserted its sovereignty over a society. “Brandeis insisted,” writes Strum, “that the state ought not merely to be negative, that it could be the agent of liberty as well as its enemy, and the question was how to enhance the first possibility without encouraging the second.” See *Ibid.*, 127-28.

¹⁷² *Brandeis On Democracy*, 186.

¹⁷³ “Success in any democratic undertaking,” averred Brandeis, “must proceed from the individual. It is possible only where the process of perfecting the individual is pursued.” *Ibid.*, 34.

¹⁷⁴ *Ibid.*, 186.

¹⁷⁵ See Strum, *Brandeis: Beyond Progressivism*, 106-14.

threads; in Palestine, Brandeis hoped to restore them.¹⁷⁶ In his vision for Palestine, Brandeis evoked the ideal of the Athenian *demos*, with its Aristotelian understanding of the individual as a social being.¹⁷⁷ He was particularly enamored of Alfred Zimmern's *The Greek Commonwealth*, a paean to Athenian democracy that profoundly influenced Brandeis's conception of the Jewish homeland.¹⁷⁸

Brandeis abhorred the atomistic individualism espoused by market fundamentalists. True freedom, Brandeis maintained, consisted in the capacity to exercise those sublime faculties that made one distinctively human—the faculties of reason and creativity, of self-creation and self-rule. In the atomized individual, Brandeis insisted, these faculties would lie fallow.¹⁷⁹ For man to be free not only to live as he desired, but to live as he was meant to live, communion with others was essential. “[The individual’s] development,” Brandeis averred, “is attained mainly in the processes of common living.”¹⁸⁰

Brandeis's conception of democracy harked back to Jefferson's ideal of the “ward republic”—a system of communal self-determination built on small political units that empowered individuals to influence collective decisions. As Jefferson described it:

Divide the counties into wards of such size as that every citizen can attend, when called on, and act in person. Ascribe to them the government of their wants in all things relating to themselves exclusively . . . and by making every citizen an acting member of the government, and in the offices nearest and most interesting to him, will attach him by his strongest feelings to the independence of his country, and its republican constitution These wards, called townships in

¹⁷⁶ See *Ibid.*

¹⁷⁷ See *Ibid.*, 103-06, 114.

¹⁷⁸ See Strum, *Brandeis: Beyond Progressivism*, 103, 106.

¹⁷⁹ As Strum writes, “Brandeis's emphasis on individual freedom did not imply approval of the self-centered capitalist . . . or of the worker whose only interests were private. Brandeis would have agreed with Rousseau that a human being's faculties can be fully exercised and developed only in a civil state, where citizens enjoy the freedom that comes from ‘obedience to the law one has prescribed for oneself.’” Strum, *Brandeis: Beyond Progressivism*, 2.

¹⁸⁰ *Brandeis On Democracy*, 34.

New England, are the vital principle of their governments, and have proved themselves the wisest invention ever devised by the wit of man for the perfect exercise of self-government, and for its preservation.¹⁸¹

For Brandeis, as for Jefferson, the small political unit was meant to foster a symbiosis between the individual and the collective, the one developing in tandem with the other. This is not to argue that either Jefferson or Brandeis favored the submergence of the individual beneath an omnipotent collective. To the contrary, both Jefferson and Brandeis cherished the ideal of the autonomous, self-reliant individual. For Jefferson, as for Brandeis, the maintenance of a private domain within which mind and spirit were free to roam, away from the pressures of society, was essential to freedom.¹⁸² “The makers of our Constitution,” Brandeis wrote in dissent in *Olmstead v. United States*, “conferred, as against the Government, the right to be let alone—the most comprehensive of rights and the right most valued by civilized men.”¹⁸³

Jefferson feared the specter of majoritarian tyranny. Like Brandeis, however, Jefferson saw no inherent antagonism between the individual and the community. To the contrary, for Jefferson, meaningful freedom—rooted not in the unimpeded pursuit of momentary desires but in a more exalted and enduring ideal of self-realization—required participation in communal life. “[Jefferson’s] individual was closer to *homo civicus* than *homo oeconomicus*[.]” writes political theorist Richard K. Matthews.¹⁸⁴ Jefferson’s yeoman farmer was meant to have a protected sphere of autonomy wherein he could be free from outside disturbance. But he was not meant to remain within that sphere. The idyllic homestead of Jeffersonian lore was a temporary, rather

¹⁸¹ Matthews, *The Radical Politics of Thomas Jefferson*, 77.

¹⁸² “Jefferson,” observes Joyce Appleby, “wanted government to offer protection to the personal realm where men might freely exercise their faculties.” Joyce Appleby, *Liberalism and Republicanism in the Historical Imagination* (Cambridge, Massachusetts: Harvard University Press, 1992), 299.

¹⁸³ *Brandeis On Democracy*, 206.

¹⁸⁴ Matthews, *The Radical Politics of Thomas Jefferson*, 12.

than a permanent, refuge from the public domain, a haven to which the citizen could repair for psychological and intellectual nourishment before reengaging in public life. For Jefferson, the private domain was less a shelter from the public domain than it was a training ground for it.¹⁸⁵

In this symbiosis between the individual and the community, government functioned as a vehicle for participating in public life, as a conduit that connected the parts of a democratic polity (i.e., individuals) to the whole (i.e., the community). Even as the specter of an overgrown Leviathan loomed in the thought of both Jefferson and Brandeis, government on a scale that permitted robust engagement in political life acted not as an oppressor but as a vessel for collective self-determination. For Jefferson, such a government entailed the protection of state sovereignty against the encroachments of federal power.¹⁸⁶ More fundamentally, though, it meant the maintenance of “ward republics,” governing units small enough to permit meaningful participation by average citizens.¹⁸⁷ Jefferson envisaged a society of citizen-legislators constantly engaged in the exercise of collective self-determination.¹⁸⁸

In exalting states and localities as the political units best-suited to a free society, Brandeis echoed Jefferson’s commitment to state sovereignty and the ideal of the ward republic. Brandeis was willing to resort to federal intervention when necessary, but he sought to preserve the position of state and local governments as the principal fora for political action. “[T]he present

¹⁸⁵ See Matthews, *The Radical Politics of Thomas Jefferson*, 77-96.

¹⁸⁶ See *Ibid.*, 97-118.

¹⁸⁷ “[Jefferson’s] own private view,” wrote Albert Jay Nock, “went far beyond the idea of the State as the self-governing unit; he was for making the smallest political unit self-governing, in order to keep the producer alert and interested.” Albert Jay Nock, *Jefferson* (Auburn, Alabama: The Ludwig von Mises Institute, 2007), 115.

¹⁸⁸ As Matthews writes, “[d]ivision and subdivision, ‘until it ends in the administration of everyman’s farm by himself,’ then, is the mechanism by which political freedom is guaranteed. Mere periodic elections are not enough for a democratic theory: ‘every day’ a man must be a ‘participator in the government of affairs.’” Matthews, *The Radical Politics of Thomas Jefferson*, 83.

tendency toward centralization[,]” Brandeis wrote, “must be arrested if we are to attain the American ideals, and . . . for it must be substituted intense development of life through activities in the several states and localities.”¹⁸⁹ Indeed, just as Brandeis viewed the small economic unit as the foundation of economic freedom, so too did he conceive of the small political unit as the underpinning of political freedom.¹⁹⁰ For Brandeis, as for Jefferson, freedom was inseparable from the small unit, whether in the market or in government.¹⁹¹ “The [curse of bigness] is applicable to government as well as to private business[,]” Brandeis contended. “Hence beware of centralization”¹⁹²

The virtue of the small unit was that it gave the average person a voice. Byzantine government bureaucracies and corporate behemoths, by contrast, drowned out the voices of all but a privileged few. “Curb of bigness,” Brandeis asserted, “is indispensable to true Democracy and Liberty. It is the very foundation also of wisdom in things human.”¹⁹³ Here again, the connection between freedom and democracy in Jeffersonian-Brandeisian thought crystallizes. The small unit undergirded freedom because it fostered self-determination and democratic engagement both in politics and in industry. It is this nexus—where freedom, democracy, and the small unit converge—that imparts to the Jeffersonian-Brandeisian worldview its singularity within the American political tradition.

Indeed, it was this distinctive blend that separated Brandeis from the Rooseveltian Progressives. The Rooseveltian Progressives envisioned society as a well-oiled machine. Utility and efficiency were the touchstones for evaluating institutional arrangements; the Good Society,

¹⁸⁹ Rosen, *Louis D. Brandeis: American Prophet*, 24.

¹⁹⁰ See Strum, *Brandeis: Beyond Progressivism*, 88.

¹⁹¹ See *Ibid.*, 83.

¹⁹² Rosen, *Louis D. Brandeis: American Prophet*, 13.

¹⁹³ *Brandeis On Democracy*, 193.

as such, was the society that worked.¹⁹⁴ For the Rooseveltians, if maximizing social welfare meant jettisoning an antiquated attachment to individual autonomy and local control, such was the necessary price of modernity.¹⁹⁵ “Economically and politically the need is for constructive regulation,” wrote Herbert Croly, one of the progenitors of the New Nationalism, “implying the imposition of certain fruitful limitations upon traditional individual freedom.”¹⁹⁶ If optimizing economic capacity meant entrusting the economy to a cadre of experts insulated from the passions of the public, such was the cost of shepherding America into the age of reason.¹⁹⁷

Jefferson and Brandeis, by contrast, conceived of society not as a well-oiled machine but rather as the instrument through which individuals both established and expressed their identities as free agents. The Jeffersonian-Brandeisian vision was not one of a glorious modernity shorn of all waste and irrationality. To the contrary, freedom and democracy necessarily bred waste.¹⁹⁸ Freedom’s discontents were not the byproducts of man’s failure to keep pace with modernity; they were the cost of ideals too precious to sacrifice. “If in any case we should find that, despite the fullest co-operation of employees, . . . reduced working time results in immediate economic loss,” Brandeis argued, “the welfare of our democratic community compels us to work nevertheless for a reasonably short work day as a condition essential to the making of good

¹⁹⁴ See Foner, *The Story of American Freedom*, 155.

¹⁹⁵ “In becoming responsible for the subordination of the individual to the demand of a dominant and constructive national purpose,” wrote Herbert Croly, one of the architects of the New Nationalism, “the American state will in effect be making itself responsible for a morally and socially desirable distribution of wealth.” Herbert David Croly, *The Promise of American Life* (Princeton: Princeton University Press, 2014), 29.

¹⁹⁶ *Ibid.*, 517.

¹⁹⁷ See Rosen, *Louis D. Brandeis: American Prophet*, 17.

¹⁹⁸ For Jefferson, these ideals entailed not only waste but also bloodshed. As Matthews writes, “[s]elf-government is [for Jefferson] a *sine qua non* of a fully human life. To achieve and maintain this style of life may be costly, as Jefferson shows: ‘To attain all this however rivers of blood must yet flow, and years of desolation pass over. Yet the object is worth rivers of blood, and years of desolation for what inheritance so valuable can man leave to his posterity.’” Matthews, *The Radical Politics of Thomas Jefferson*, 86.

citizens.”¹⁹⁹ For Brandeis and Jefferson, the Good Society was not the society that worked in the utilitarian sense. Rather, it was the society that worked to preserve and promote the twin ideals of freedom and democracy.²⁰⁰

Freedom and democracy converged in Brandeis’s thought in two respects. First, Brandeis viewed democracy as a source of raw material power, as a weapon for wresting control from economic elites. Second, Brandeis conceived of democracy as a fount of human enrichment, as a vessel for self-creation and self-rule that kept the vital citizen from degenerating into the pliant subject. “The greatest menace to freedom,” Brandeis wrote in *Whitney v. California*, “is an inert people.”²⁰¹ I turn now to an examination of these aspects of Brandeis’s vision of democracy through the prism of his support for “industrial democracy,” a system of worker control that empowered laborers themselves to determine the course of productive enterprise.

b. Labor Solidarity as Worker Emancipation

Brandeis’s place in the pantheon of American Progressivism tends to obscure the fact that he was a convert to the Progressive cause. When precisely Brandeis’s beliefs shifted is a matter of debate. By his own account, however, the Homestead Strike of 1892 was pivotal to his evolution. “[I]t was the affair at Homestead which first set me to thinking seriously about the labor problem,” Brandeis explained. “It took the shock of that battle, where organized capital

¹⁹⁹ *Brandeis On Democracy*, 94.

²⁰⁰ Urofsky distills the divergence between Brandeis and the Rooseveltians: “Roosevelt argued for the greater efficiency of the large unit; Wilson spoke for the democratic value of the small unit. Brandeis recognized that small units might be wasteful at times, but democracy itself was a wasteful system; political liberties, however, more than compensated for these wastes. Wilson and Brandeis desired a greater individual liberty under a simplistic government, while Roosevelt called for a strong social organism, superior to the individual, in a system designed primarily for efficiency.” Urofsky, *Louis D. Brandeis and the Progressive Tradition*, 73.

²⁰¹ Rosen, *Louis D. Brandeis: American Prophet*, 128.

hired a private army to shoot at organized labor for resisting an arbitrary cut in wages, to turn my mind definitely toward a searching study of the relations of labor to industry.”²⁰² For Brandeis, Homestead laid bare the coercive power structure that underlay relations between labor and capital:

One morning the newspaper carried the story of the pitched battle between the Pinkertons on the barge and barricaded steel workers on the bank. I saw at once that the common law, built up under simpler conditions of living, gave an inadequate basis for the adjustment of the complex relations of the modern factory system. I threw away my notes and approached my theme from new angles.²⁰³

Beginning with Homestead, Brandeis came to view unfettered industry as a threat to the freedom of workers, and labor solidarity as a means of liberating workers from the clutches of capital.

The critical moment in the Homestead Strike of 1892 came when the Carnegie Steel Company dispatched the Pinkerton National Detective Agency, a mercenary police force, to squash a worker uprising. Dozens were killed or wounded before the fighting ended. In the denouement, strikers returned to their stations with their wages slashed and their power diminished.²⁰⁴ Homestead was one among many conflagrations that erupted between labor and capital in the late 19th and early 20th centuries. But it was typical of such episodes in at least one respect: in Homestead, as elsewhere in the country, the law stood decisively in the corner of capital. Conservative courts had long upheld “yellow-dog” contracts—that is, employment contracts that barred workers from joining a union—under the legal doctrine of “liberty of contract.”²⁰⁵ For conservative jurists, freedom meant an inviolable right to enter into commercial

²⁰² Baskerville, *Of Laws and Limitations*, 109.

²⁰³ *Ibid.*, 110.

²⁰⁴ See Lewis J. Paper, *Brandeis: An Intimate Biography of Supreme Court Justice Louis D. Brandeis* (New York: Open Road Integrated Media (iBooks edition), 2014), 109-10.

²⁰⁵ See Gillman, *The Constitution Besieged*, 139.

transactions. To deny employers the ability to contract with willing employees on mutually agreeable terms was to deprive both of the right to earn a living by their own free exertions.²⁰⁶

This reverence for contractual liberty rested on a simplistic understanding of the power relations that drove negotiations between labor and capital. For conservative jurists, employment contracts were expressions of individual freedom. As such, they were entitled to judicial deference.²⁰⁷ The “labor injunction,” whereby courts enforced employment contracts by ordering an end to strikes, became the standard device by which employers repressed labor activism.²⁰⁸ Even the Sherman Act of 1890, designed to prevent collusion between large corporations, became a weapon of capital, as courts interpreted the act to bar union activity in “restraint of trade”—a stinging irony for Progressives, and a reflection of the systemic barriers that confronted the labor movement.²⁰⁹

For Brandeis, Homestead—and the broader labor unrest that it represented—illuminated the disjuncture between the realities of the industrial age and the illusion of freedom embodied in the doctrine of “liberty of contract.”²¹⁰ To begin with, Homestead revealed that coercion—even violent coercion—was hardly the exclusive province of the state. Indeed, Carnegie Steel could not have prevailed in Homestead without the might of the Pinkertons behind it. Nor was such repression peculiar to Homestead. To the contrary, such tactics were widespread. Historian Eric

²⁰⁶ See *Ibid.*, 132-46.

²⁰⁷ See *Ibid.*

²⁰⁸ See *Ibid.*, 85.

²⁰⁹ See Strum, *Louis D. Brandeis: Justice for the People*, 345-46.

²¹⁰ “What [Brandeis] learned from the bitter confrontation at Homestead,” Baskerville writes, “was that the precepts of the [common law] tradition were, by themselves, an insufficient guide to the conduct of public policy, particularly where legal formulas and socioeconomic realities appeared to require the adoption of divergent and irreconcilable courses of action.” Baskerville, *Of Laws and Limitations*, 130-31.

Foner offers a sense of the pervasiveness and perniciousness of corporate repression during this period:

Beginning in 1936, a Senate subcommittee . . . exposed the methods used by employers to combat unionization, including a vast array of spies and private police forces. Workers had “no liberties at all,” an employee of General Motors wrote the committee from Saginaw, Michigan. The extensive violence unleashed against strikers in California’s cotton and lettuce fields and canneries made that state, the committee report concluded, seem “more like a fascist European dictatorship than part of the United States.”²¹¹

The principal form of coercion that underlay relations between labor and capital was less flagrant than the violent repression in Homestead, however. This subtler kind of coercion grew out of fear of the destitution that came with unemployment. The doctrine of “liberty of contract” rested on the assumption that the parties to a contract were free to refuse the terms. For jurists committed to that doctrine, contracts reflected negotiations between free counterparties capable of assessing whether a given arrangement served their interests.²¹² For Brandeis, this was mere fiction. On the surface, transactions between worker and employer tended not to involve overt physical coercion of the sort employed in Homestead. Beneath the exterior, however, the chasm in power between labor and capital created economic pressures no less coercive than guns and tear gas. To refuse employment often meant desperate poverty—particularly where one or two firms dominated a market, leaving workers with no real alternative to dismal terms of employment. “[W]e have the situation,” Brandeis averred, “of an employer so potent, so well-organized, with such concentrated forces and with such extraordinary powers of reserve and the ability to endure against strikes and other efforts of a union, that the relatively loosely organized masses of even strong unions are unable to cope with the situation.”²¹³ The threat of poverty, as

²¹¹ Foner, *The Story of American Freedom*, 215.

²¹² See Gillman, *The Constitution Besieged*, 132-46.

²¹³ *Brandeis On Democracy*, 98.

such, was a cudgel with which capital battered labor into submission on pay, working conditions, and collective bargaining rights.

Brandeis recognized that poor wages and working conditions were not the free choice of workers. Rather, they were the conditions to which necessity had condemned them. For Brandeis, no one could “be really free who is constantly in danger of becoming dependent for mere subsistence upon somebody and something else than his own exertion and conduct.”²¹⁴ Workers endured abuse on the factory floor because insubordination meant starvation. This was hardly the benign rule of an “invisible hand.” It was the stranglehold of power incarnate—of floor bosses and shift supervisors to whose mood and whim workers were prisoner. The twin doctrines of *laissez faire* and liberty of contract may have meant self-determination for capital. For labor, however, they translated into a form of economic bondage. “Men are not free,” Brandeis contended, “if dependent industrially upon the arbitrary will of another.”²¹⁵

For Brandeis, real freedom—as opposed to freedom in the abstract, of the kind outmoded economic and legal theories offered—demanded a fundamental transformation in the relations between labor and capital. “[T]he sense of being subject to the power of the employer,” Brandeis maintained, “can not be removed without changing the conditions under which industry is being carried on.”²¹⁶ Such transformation could be achieved, he thought, only when labor actively participated in management.²¹⁷ Brandeis praised worker cooperatives and urged unions to focus less on higher wages and more on securing a place in corporate governance.²¹⁸ For

²¹⁴ Strum, *Brandeis: Beyond Progressivism*, 157.

²¹⁵ *Brandeis On Democracy*, 28.

²¹⁶ *Ibid.*, 102.

²¹⁷ See *Ibid.*, 21.

²¹⁸ “He began talking,” Strum explains, “about an economic system in which ‘labor will hire capital, instead of capital hiring labor,’ with workers owning and managing their own enterprises cooperatively and consumers also combining in cooperatives.” *Ibid.*, 11.

Brandeis, such “industrial liberty” not only mirrored traditional political liberty; it was a precondition for it.²¹⁹ If workers lacked industrial liberty, Brandeis argued, “[m]ust not this mean that the American who is brought up with the idea of political liberty must surrender what every citizen deems far more important, his industrial liberty? Can this contradiction—our grand political liberty and this industrial slavery—long coexist?”²²⁰

Brandeis understood that such industrial liberty depended on labor and capital confronting each other on a more even plain. Government, he believed, could help correct the power asymmetry that kept labor in thrall to capital. If government were enlisted to the cause of labor, it could magnify the power of unions and help emancipate workers from the grip of capital.²²¹ For Brandeis, legislation guaranteeing collective bargaining rights, a minimum wage, maximum hours, and decent working conditions was necessary to augment the power of labor in its struggle with capital. “Industrial liberty on the part of the worker cannot . . . exist if there be overweening industrial power[,]” Brandeis insisted. “Some curb must be placed upon capitalistic combination.”²²² The economic pressures that impelled workers to accept raw bargains might overwhelm a labor movement whose only asset was an ever-fragile solidarity. But a labor movement armed with a legal guarantee of collective bargaining rights, a fair wage, and tolerable hours and working conditions could threaten firms with a protracted loss of their entire labor force. The aim, as Brandeis put it, was to “equalize before the law the position of workingmen and employer as industrial combatants.”²²³ The untrammelled market had thrust a wrenching choice upon labor: unemployment and poverty, or submission to exploitation. Government

²¹⁹ See Strum, *Brandeis: Beyond Progressivism*, 157.

²²⁰ *Ibid.*

²²¹ See *Brandeis On Democracy*, 186.

²²² *Ibid.*, 28.

²²³ Rosen, *Louis D. Brandeis: American Prophet*, 104.

could balance the scales by forcing a dilemma on capital: compromise with labor, or risk serious disruptions to production. Government thus helped to upend a coercive power imbalance.²²⁴ Far from imperiling freedom, a government allied to labor was indispensable to it.²²⁵

This is not to contend that Brandeis's commitment to labor rights derived solely from his desire to guarantee freedom for workers. Indeed, Brandeis viewed government support for organized labor as a means of combating privation and inequality as well as industrial despotism. "[T]rade unions," Brandeis asserted, "have been largely instrumental in securing reasonable hours of labor and proper conditions of work; in raising materially the scale of wages, and in protecting women and children from industrial oppression."²²⁶ Ultimately, however, Brandeis viewed improvements in workers' material conditions as subsidiary to the cause of freedom.²²⁷ For Brandeis, labor rights did not merely contribute to social and economic amelioration; they enshrined in law a vision of freedom for the industrial age. Government, as the handmaiden of organized labor, furthered that vision; the unfettered market, as the province of capital, subverted it.

Brandeis's notion of collective bargaining rights as a cudgel against industrial tyranny would later appear in the preambles to the New Deal's chief legislative forays into the field of labor relations: the Norris-LaGuardia Act of 1932, also known as the Anti-Injunction Act, and the National Labor Relations Act of 1935, also known as the Wagner Act. The preamble to the Norris-LaGuardia Act set out the condition the Act sought to remedy: namely, that "under prevailing economic conditions . . . the individual worker is commonly helpless to exercise

²²⁴ See *Brandeis On Democracy*, 74.

²²⁵ See *Ibid.*, 10.

²²⁶ *Ibid.*, 76.

²²⁷ *Ibid.*, 75.

actual liberty of contract and to protect his freedom of labor, and thereby to obtain acceptable terms and conditions of employment.”²²⁸

In like fashion, the Wagner Act recognized that the doctrine of liberty of contract had obscured a coercive power structure and sustained a kind of economic bondage. In seeking to redress the “inequality of bargaining power between employees who do not possess full freedom of association or actual liberty of contract and employers who are organized in the corporate or other forms of ownership association[,]” the Wagner Act safeguarded the freedom of workers and struck a blow against the tyranny of the untrammelled market.²²⁹ Government acted in this instance not as a source of constraint, but as a vehicle for worker emancipation.²³⁰

None of this is to argue that Brandeis viewed government as a wholly benign actor in the struggle between labor and capital. Brandeis knew well that, while industrial titans and their conservative allies clung to the doctrine of *laissez faire*, they hastened to invoke the machinery of government to further their own interests. Indeed, conservative judges and legislators were frequently enlisted to the cause of industrial despotism.²³¹ Even beyond government’s complicity in the tyranny of capital over labor, however, Brandeis stood apart from many of his Progressive contemporaries in his distrust of centralized government power. Though generally supportive of Franklin Roosevelt’s New Deal, for instance, Brandeis balked when New Dealers sought to consolidate power in the federal government.²³² With power concentrated in the

²²⁸ 29 U.S.C. Sec. 102.

²²⁹ 29 U.S.C. Sec. 151.

²³⁰ The Supreme Court, long a bastion of capital, would later uphold the law, vindicating Brandeis: “In the *Jones & Laughlin* case, which upheld the law, Chief Justice Hughes in one sentence summed up what Brandeis had been preaching for so many years: ‘We refuse to shut our eyes to the plainest facts of our national life and to deal with these issues in an intellectual vacuum.’” Urofsky, *Louis D. Brandeis and the Progressive Tradition*, 168.

²³¹ See Strum, *Brandeis: Beyond Progressivism*, 154.

²³² See Urofsky, *Louis D. Brandeis and the Progressive Tradition*, 160.

central government, Brandeis insisted, “we may get amelioration, but not a working ‘New Deal.’ And we are apt to get Fascist manifestations.”²³³ For just as power centralized in remote corporate boardrooms endangered economic freedom, so too did authority concentrated in distant government bureaucracies threaten political freedom.²³⁴

Still, Brandeis’s fear of centralized government power should not be mistaken for a more general aversion to robust government action designed to further the ideal of self-determination. For Brandeis, if concentrated industrial power created fertile ground for oppression, government could either prop up this coercive edifice, or it could help tear it down. Brandeis sought to fashion a government committed to the latter course.²³⁵

c. Industrial Freedom and the Democratization of Self-Creation

Brandeis viewed the labor movement as an essential weapon in the American worker’s struggle against industrial despotism. Yet, for Brandeis, the material gains of the labor movement—recognition of unions and collective bargaining rights, higher wages, and more humane hours and working conditions—were merely prelude to a more thorough-going transformation in industrial governance. Brandeis understood that the advances of the labor movement provided much-needed physical relief to the American worker. Here again, however, Brandeis conceived of material well-being not as an end in itself but rather as a precondition for mental and spiritual vitality. The project of the labor movement, as Brandeis saw it, was not merely to guarantee prosperity to the American worker. Rather, it was to cast off the yoke of capital and to empower workers to seize control of their own lives. Only when workers were

²³³ *Ibid.*

²³⁴ See Strum, *Brandeis: Beyond Progressivism*, 73.

²³⁵ See *Ibid.*, 151.

liberated from their dependence on and subservience to capital could they develop the strength of mind and spirit that undergirded true freedom.²³⁶

From Brandeis's perspective, the goal of the labor movement was to imbue workers with the same sense of independence and self-ownership that animated the yeoman farmer and the small businessman. The aim, that is, was to democratize the act of self-creation—the *sine qua non* of freedom in its spiritual and psychological as well as in its physical dimensions. “[N]o remedy can be hopeful,” Brandeis insisted, “which does not devolve upon the workers participation in and responsibility for the conduct of business; and their aim should be the assumption of full responsibility—as in cooperative enterprises.”²³⁷ The ideal of the self-sustaining small businessman was pivotal to Brandeis's adaptation of Jeffersonianism to 20th century America. But it was no panacea for the scourge of industrial despotism. For most Americans would never enter the ranks of independent merchants, artisans, and shopkeepers. Rather, they would remain ordinary laborers engaged in a common enterprise, codependent pieces of a larger whole.²³⁸

The question, then, was the extent to which they were able to determine the direction of that enterprise. If workers passively executed the commands of others, they would languish in spiritual and psychological poverty, no matter the amelioration in their material conditions. Decent wages, tolerable hours, and more humane working conditions were necessary—but not sufficient—conditions for meaningful freedom. If the American worker were to achieve the vitality of mind and spirit that the yeoman farmer and the small businessman embodied, he could

²³⁶ See *Brandeis On Democracy*, 91; Strum, *Brandeis: Beyond Progressivism*, 34-35.

²³⁷ Strum, *Brandeis: Beyond Progressivism*, 46.

²³⁸ See Urofsy, *Louis D. Brandeis and the Progressive Tradition*, 21.

not rest with material progress.²³⁹ Only industrial democracy—understood as the right of workers to influence the nature and direction of productive enterprise—could forge individuals capable of self-creation and self-ownership. For Brandeis, writes Strum, “[d]emocracy was not only the appropriate alternative to absolutism; it also possessed what might be called a psychological component. . . . [T]he individual who was not continually involved in the formal community created by the social contract would be deprived of experiences necessary to individual self-fulfillment.”²⁴⁰

Here again, Brandeis saw a division between material progress and industrial freedom, and while he generally conceived of material gains as a precursor to industrial liberty, he recognized that the two were not necessarily in harmony. Indeed, Brandeis feared that corporations would use the promise of financial gain as leverage to thwart demands for industrial democracy. He saw the emergence of company-funded pensions not as an advance for labor but as a tool of capital, as a kind of collateral that fastened capital’s grip on labor:

Under the pension system everyone who remains with the corporation may look forward to getting a pension, but he has no right to it. It is absolutely in the discretion of the directors whether or not he shall get it or if it shall be withdrawn even after it has been granted. Anything that may in their opinion indicate that the worker is not loyal or working for the interests of the corporation . . . will result in loss of pension [T]here is growing up under the guise of welfare work and efforts for more humane conditions for labor, a system which robs the laborer of what liberty he should have. It is a condition which explains with peculiar force the term ‘iron master.’²⁴¹

For Brandeis, if workers were to achieve the strength of mind and spirit characteristic of the yeoman farmer and the small businessman, they had ultimately to take the reins of industrial

²³⁹ “Shorter hours and more money would bring [workers] the leisure for involvement in public affairs and self-fulfillment that [Brandeis] considered necessary to a democratic state and to the individuals within it,” writes Strum, “but such working conditions, although desirable, would not bring democracy to the workplace.” Strum, *Brandeis: Beyond Progressivism*, 34.

²⁴⁰ *Ibid.*, 162.

²⁴¹ *Brandeis On Democracy*, 126-27.

power themselves. Unions and worker-protective legislation were essential to improving the material condition of the working class and thus to laying the groundwork for workers' eventual assumption of responsibility for productive enterprise. But only the regular exercise of power and creativity in a cooperative undertaking could yield the spiritual and psychological vigor necessary for genuine freedom. For Brandeis, writes Strum, "[i]t was only the good citizen who could truly be free, for the willingness to face the vicissitudes of public life was a prerequisite of liberty."²⁴²

The corollary of Brandeis's conviction that freedom consisted not in the satisfaction of fleeting material desires, but rather in a more elevated and enduring state of being, was that freedom could not be *provided*; instead, it had to be *attained*. By its very nature, freedom did not descend from the heights of power; it could not be bestowed by an external force. Rather, it resided within, as a force to be awakened by the invigorating experience of self-creation. For Brandeis, "life [was] not a having and a getting; but a being and a becoming."²⁴³ Freedom emerged not from the "having and getting" of prosperity but rather from the "being and becoming" of self-creation.²⁴⁴ This conception of freedom as a thing to be achieved rather than conferred lay beneath Brandeis's rejection of the technocratic elitism of Theodore Roosevelt's New Nationalism.²⁴⁵ For Brandeis, freedom could not be ushered in by the benevolent stewardship of elite sages. Rather, it demanded the empowerment of the citizenry.

By contrast, Herbert Croly, among the most prominent New Nationalists, envisaged an energetic central government guided by the formula "Jeffersonian ends through Hamiltonian

²⁴² Strum, *Brandeis: Beyond Progressivism*, 10.

²⁴³ *Ibid.*, 21.

²⁴⁴ See *Ibid.*

²⁴⁵ See *Ibid.*, 36.

means.”²⁴⁶ This fusion of Jefferson’s conception of man with Hamilton’s vision of government would place a cadre of enlightened experts at the helm of the national economy, with the aim of delivering a higher standard of living to the wider public. The Hamiltonian vision, wrote Croly, “implied the predominance in American life of the men who had the energy and the insight to discriminate between those ideas and tendencies which promoted the national welfare, and those ideas and tendencies whereby it was imperiled.”²⁴⁷ For Brandeis, these were contradictions in terms. Jeffersonian ends could only be achieved by Jeffersonian means.²⁴⁸ True freedom could not exist without genuine self-determination, and self-determination entailed not the top-down provision of fair wages and working conditions but rather direct worker control of productive enterprise.

Brandeis’s vision for labor, as such, was not one of prosperity bestowed by a beneficent employer. “[W]hat we want,” Brandeis averred, “is to have the workingman free, not to have him the beneficiary of a benevolent employer”²⁴⁹ Rather, Brandeis envisioned the workplace as a vibrant democracy, fueled by a dynamic process of exchange and cooperation between self-governing workers. He recognized that widespread industrial democracy was not an imminent prospect. Rather, it would be the culmination of a long evolution:

In my judgment, we are going through the following stages: We already have had industrial despotism. With the recognition of the unions, this is changing into a constitutional monarchy, with well-defined limitations placed about the employers’ formerly autocratic power. Next comes profit-sharing. This, however, is to be only a transitional, half-way stage. The eventual outcome promises to be full-grown industrial democracy.²⁵⁰

²⁴⁶ See Croly, *The Promise of American Life*, 33-64.

²⁴⁷ Croly, *The Promise of American Life*, 49.

²⁴⁸ For a description of the division between Brandeis and Croly, see Rosen, *Louis D. Brandeis: American Prophet*, 62-65.

²⁴⁹ Urofsky, *Louis D. Brandeis and the Progressive Tradition*, 40.

²⁵⁰ *Brandeis On Democracy*, 96.

Even in Brandeis's day, however, there had emerged successful worker cooperatives—in particular in parts of England and Scandinavia—and Brandeis looked admiringly upon these shining examples of worker self-rule.²⁵¹

For Brandeis, industrial democracy was to the American worker what stewardship of arable land was to the yeoman farmer and what control over independent commercial enterprise was to the small businessman: a crucible of self-creation that engendered the sturdy character of the free individual. “[T]ens of thousands more Americans could be rendered competent to guide our important businesses[,]” Brandeis argued. “Liberty is the greatest developer.”²⁵² Industrial democracy, as such, was not only the vehicle through which workers maintained their sovereignty over their labor and environment; it was also the mechanism that kept the vigor and self-reliance of the citizen from deteriorating into the passivity and subordination of the subject. “Herodotus tells us that while the tyrants ruled, the Athenians were no better fighters than their neighbors[,]” Brandeis wrote. “[B]ut when freed, they immediately surpassed all others. If industrial democracy . . . should be substituted for industrial absolutism, there would be no lack of industrial leaders.”²⁵³

It is here that the kinship between Jefferson's ward republic and Brandeis's vision of industrial democracy is most manifest. For Jefferson, the ward republic was the organ through which the *demos* exercised control over society, but it was also a galvanic force, a means of engaging and energizing the mind and spirit of the citizen.²⁵⁴ This was precisely how Brandeis conceived of industrial democracy: both as a source of power and control and as a wellspring of vigor and enrichment. The latter function was no less essential to freedom—both of the

²⁵¹ Strum, *Brandeis: Beyond Progressivism*, 41.

²⁵² *Ibid.*, 132.

²⁵³ *Ibid.*, 132-33.

²⁵⁴ See Matthews, *The Radical Politics of Thomas Jefferson*, 77-96.

individual and of the *demos*—than was the former. For Brandeis, democracy did not subsume the individual personality beneath a pallid sameness, as in libertarian thought. Instead, it vivified and strengthened that personality.²⁵⁵

Industrial democracy was Brandeis's attempt, in an ever more urban and industrial society, to democratize the freedom of the yeoman farmer and the small businessman. In a free society, the ideals of self-creation and self-ownership could not be the exclusive property of an enterprising few. "Here and there you will find a hero,—red-blooded, and courageous,—loving manhood more than wealth, place or security,—who dared to fight for independence and won[.]" Brandeis wrote. "Here and there you may find the martyr, who resisted in silence and suffered with resignation. But America . . . cannot be content with conditions that fit only the hero, the martyr or the slave."²⁵⁶

For Brandeis, there had to be space for average citizens to assert themselves as free and independent agents. "The civilized world today believes that in the industrial world self-government is impossible; that we must adhere to . . . the system of master and servant, or, as now more politely called, employer and employee," Brandeis proclaimed. "It rests with this century . . . to prove that as we have in the political world shown what self-government can do, we are to pursue the same lines in the industrial world."²⁵⁷ Brandeis arrived at freedom by way of democracy, and it is this nexus—where individual liberty meets the ideal of the *demos* as applied to the workplace—that both distinguishes Brandeisian thought and commends it to the present day.

²⁵⁵ See *Brandeis On Democracy*, 34.

²⁵⁶ Brandeis, *Other People's Money*, 33.

²⁵⁷ Strum, *Brandeis: Beyond Progressivism*, 160.

IV. CONCLUSION

The financial crisis of 2007-08 introduced the American public to numerous arcane financial concepts, from “mortgage-backed securities” to “subprime lending” to “credit-default swaps.” Perhaps the most enduringly relevant neologism to emerge from the crisis, however, has been the concept “too big to fail.” This stands for the proposition that the failure of certain financial institutions would pose so grave a “systemic risk” to the economy that government would need to intervene to prevent their collapse. In the wake of the financial meltdown, the federal government did precisely that, rescuing pivotal financial firms from the brink of ruin and restoring safety and soundness to the financial system. The Dodd-Frank Act of 2010 imposed new regulatory burdens on financial institutions, but it left intact the “too big to fail” goliaths that were at the center of the 2007-08 collapse. From a Brandeisian perspective, it is difficult to imagine a more disturbing sequence of events: the perpetration of a fraud against a bewildered public by distant and opaque financial firms, followed by a new layer of federal regulation and a squandered opportunity to dissolve the “too big to fail” behemoths once and for all.

There was at least one silver lining to the financial meltdown of 2007-08, however. Far from the terrain of freedom, the untrammled market was exposed as a site of reckless exploitation. Seldom in American history had the libertarian conflation of freedom with the unfettered market seemed so misguided. In the main, however, the emancipatory potential of government went unfulfilled. Rather than heed Brandeis’s admonitions against concentrated power, the federal government sought to manage “too big to fail” institutions in the Rooseveltian mold. Rather than liberate the public from the clutches of corporate control, government cast itself as an organ of stasis and stability. Yet the opportunity remains to redefine government as an instrument of liberation. Seizing that opportunity demands that the American Left search its

past for guidance. The political and economic thought of Louis D. Brandeis stands as an ideal point of departure for that vital undertaking.

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